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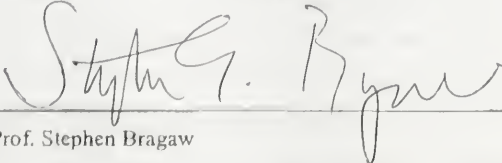
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"The Practical and Philosophical Viability of the Libertarian Position"

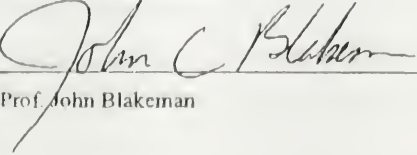
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A Senior Honors Thesis in the Department of Government, Sweet Briar College
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Introduction

My purpose in this paper is to examine what I regard as the most significant problems faced by those who attempt to make the case for minimal government, or the “minarchist” State. In particular, I will focus on the arguments and issues raised in Robert Nozick’s Libertarian work, *Anarchy, State, and Utopia*. I have chosen this articulation of minarchist thought for several reasons. First, Nozick is one of the few proponents of the minimal State to seriously examine not only the moral argument for the welfare State (such as that advanced by John Rawls), but the anarcho-capitalist position (such as that advanced by Murray Rothbard). Second, Nozick’s work is particularly interesting because he (for the most part) adopts the same Kantian moral foundation as Rawls (and many other proponents of the maximal State), yet he arrives at a radically different conclusion in the political realm. Finally, Nozick’s work is significant in that the attention it received from both academics and the general populace has helped to foster widespread discussion of the merits—and pitfalls—of the Libertarian position.

I have divided my work into four sections. In the first section, I will examine and evaluate Nozick’s attempt to refute the free-market anarchist position. My main focus will be on the question of whether Nozick’s “invisible-hand” explanation succeeds; that is, whether he supplies a plausible rebuttal to the anarchist contention that the State must necessarily violate individual rights in order for it to emerge and sustain itself. I will argue that Nozick fails, for two reasons. First, his explanation is not an “invisible-hand” one at all; and, second, even if we were to remove the non-invisible-hand components of his argument, the process Nozick describes would founder (that is, it would be unable to produce the State).

In the second section, I will supplement Nozick’s argument with those offered by other proponents of the minimal State, and then subject these to similar scrutiny. After examining various minarchist attempts to dispatch with anarchist criticisms (for example, that the State cannot emerge or maintain itself without violating individual rights), I will conclude that although minarchists do not successfully respond to these criticisms, some of the dilemmas raised do equal damage to the anarchist argument.

In the third section, I will scrutinize the Kantian moral foundations common to both Nozick and Rawls, and evaluate both Rawls' translation of these into the Original Position as well as Nozick's attempt to present a somewhat modified version of them. I will also look at attempts made by Libertarians to posit a naturalistic morality in hopes of avoiding the dilemmas inherent in the Kantian position.

In the final section, I will examine Nozick's view of property rights and attempt to determine whether a less problematic theory of property could provide better support for Libertarianism. I will especially focus on the criticisms directed at Nozick's property theory. Rawls' theory of distributive justice will also be evaluated, and Nozick's criticisms of it will be presented as well. I will argue that although both Nozick and Rawls's theory of property and its distribution contain inconsistencies, attempts to adhere strictly to a Lockean theory of just acquisition and transfer (minus the Proviso) cannot be reconciled with modern subjective value theory.

I. Nozick's Invisible-Hand Process

What is "The State"?

One of Nozick's most difficult tasks is to define what constitutes a "state," and to do so in such a manner that his own "invisible-hand" process is able to bring it about. The "state" that arises out of Nozick's State of Nature is a dominant protective agency that attains and enforces monopoly status. Consequently, it contains certain idiosyncrasies that defy common conceptions of the State. The state that Nozick presents has two distinct incarnations: the "ultraminimal state" and the "minimal state." (The "ultraminimal state" represents a hypothetical transition period; the minimal state is the final resting point for Nozick's "utopia.")

Nozick's "ultraminimal state," which arises solely through market forces, establishes a monopoly over protection and the provision of justice insofar as it prohibits the private use of force (by both individuals and other agencies), except in instances of "immediate self-defense."¹ It provides its services only to those who purchase it. The "minimal state," on the other hand, compensates those who are not clients of the

dominant agency, and consequently are prohibited from enforcing their own protective and judicial methods (or purchasing it from competitors).ⁱⁱ Although the minimal state has the right to prohibit independents' protective and judicial procedures if they judge them to be too "risky" (which will be in most cases), theoretically, if the minimal state approves of the procedure used by an independent agency, such independent procedures would be permitted.ⁱⁱⁱ

It is immediately apparent that Nozick's state differs significantly from the traditional concept of the "nation-state." Many attempts have been made to definitively establish what constitutes a state. The four major criteria identified in the Montevideo Convention on Rights and Duties of States¹ suggest a much more definitive state than Nozick's. Nozick's state may or may not possess a "permanent population," and whether those running the protective agency may properly be called a "government" is certainly not indicated by the description Nozick provides. It is likely that Nozick's protective agency would have a "defined territory," but, given that this territory is based on the property held by its private clients, we cannot necessarily assume that the state's boundaries would be permanent. As for whether Nozick's minimal State could "enter into relations with other states," there is little evidence for or against this.^{iv} When we regard Guggenheim's two criteria for statehood, Nozick's state fares little better. Guggenheim stipulates that the entity in question have "a degree of centralization of its organs not found in the world community" and that in its particular geographical region, it be "the sole executive and legislative authority"; that is, that it be independent of other "state legal orders."^v Whether Nozick's state would meet the first criterion depends on how those running the dominant protective agency chose to operate. It is equally possible that the company be run in a centralized fashion as a decentralized one. The second criterion seems to fit Nozick's state fairly well, although if it did allow other agencies with similar procedures to operate, its conformity to this criterion might come into question. Hans Kelsen echoes this idea in *General Theory of Law and State*. He argues that when sanctions are established and enforced (in an organized fashion) against certain types of individual behavior, a "coercive order" can be said to exist.^{vi} In the

¹ In December of 1933, the Montevideo Convention on Rights and Duties of States issued the following criteria for statehood: "(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States. (See endnote iv).

realm of international law, such an order can be considered a “national legal order” if it is relatively centralized, and is inferior in authority only to international law.^{vii} Nozick cites as his basic criterion Max Weber’s definition of the State as a single entity enforcing a monopoly on the use of force within a given territory.^{viii}

Even when we adopt the criterion that Nozick favors—that the entity establish a monopoly on the legitimate use of force in a given area—we find that counterexamples arise among the entities we currently label as “states.” Nozick points out that in any given state, there may exist—in addition to a coercive entity that claims itself as the sole legitimate user of force—individuals or groups of individuals who either use force (without authorization from the government) or reject the government as a legitimate authority and pacifistically establish themselves as the “true authority.” Citing Marshall Cohen, Nozick points to groups such as the Mafia and the KKK, who would seem to undercut the authority of many of the entities that are currently recognized as states.^{ix} Thus, on closer consideration, we find that the monopoly-on-force criterion is—as Nozick points out—neither a necessary nor sufficient condition for statehood.^x Nozick’s own “minimal state” formulation, while unfamiliar, is hardly more problematic than the traditional concept of the nation-state.

After articulating the difficulty in attempting to satisfactorily define the State, Nozick furnishes his own *ad hoc* definition of statehood to be employed in his argument. The State, he argues, must announce that, “to the best of its ability,” it will prohibit the private (unauthorized) use of force and that it will inflict punishment on those who attempt to flout this rule.^{xi} While Nozick admits that such a definition still does not adequately cover the situations that might arise within this state (for instance, if it decides that it may forgive unauthorized users of force *ex post facto*), he argues that it will suffice for the purposes of *his* argument.^{xii}

Nozick’s Methodology

Perhaps the most unique aspect of *Anarchy, State, And Utopia* is that it does *not* immediately dismiss the anarchist position. Nor does Nozick attack straw men assumed to represent the anarchist position; unlike most minarchist critics of free-market

anarchism, Nozick does not assume that anarchists adhere to a utopian vision in which fully rational and benevolent individuals interact peacefully with one another and without need of arbitration or punishment. Rather, Nozick embarks upon his argument by presenting a State of Nature that conforms (approximately) to that envisioned by most market anarchists. In Nozick's State of Nature, individuals meet their security and justice needs by joining protective agencies. Initially, no single agency dominates a particular geographical region; it is assumed that the clients of different agencies are interspersed throughout an area with no firm territorial boundaries. When clients belonging to different agencies come into conflict with one another, the agencies either do battle with one another or resort to an appeals court to make the final decision.^{xiii}

Nozick emphasizes that his argument for the minimal state (as opposed to market anarchy) is not an appeal to the notion of "state sovereignty" or the immorality of a stateless society. Rather, he endeavors to show that an "invisible-hand process" would bring about the dominance of one particular protective agency, which would eventually evolve into the minimal state. Nozick establishes certain guidelines for his explanation: first, that the emergence of an ultraminimal ("night-watchman")^{xiv} state out of anarchy occur through an invisible-hand process (that is, the forces of human choice as exercised on the free market); and, second, that the transition from the ultraminimal state to the (quasi-redistributive) minimal state be morally necessitated.^{xv}

Thus, two forces are at work in Nozick's justification of the State: the nonmoral, "invisible-hand" force, which gains its clout from the neutral realism of market forces; and the moral force, which Nozick legitimates by appealing to readers' commonly-held moral sentiments (e.g., the autonomy of the individual, the Kantian imperative to treat others as ends in themselves, rather than merely as means, etc.). Nozick also imposes on his argument the constraint that the State does not possess any rights beyond the sum of rights held by the individuals who comprise it, which means that its actions are limited to those that lie within the scope of justifiable action for each individual.

The strength of Nozick's argument hinges on several factors. The process that Nozick describes—unhindered market forces bringing about the dominance of a single protective agency and its judicial system—must be a plausible one. Moreover, in order to rule out the anarchist alternative, the process he describes must *necessarily* come about.

If a likely (or at the very least, viable) anarchist alternative exists in contrast to the emergence of Nozick's ultraminimal State, then the invisible-hand argument loses much of its persuasive force, since it relies on its appeal to realism and practical necessity, rather than normative considerations. Additionally, both the moral premises Nozick adopts and the manner in which he employs them must be, at the very least, internally consistent. Finally, we must consider the overall coherency of Nozick's argument. We must consider such questions as, how do Nozick's moral constraints interact with his justification for using an invisible-hand explanation? Does his explanation consider all relevant possibilities and outcomes for the situations he describes? What are the implications of the minimal state he ultimately arrives at? How well does Nozick's minimal state conform to the moral premises he outlines at the outset of his argument? Answering these questions can be difficult, since, at times, Nozick does little more than skim the surface of the moral premises that provide his argument with momentum. Occasionally, after incorporating a moral principle into his argument, he will identify the troubling and often very damaging ambiguities and conundrums that arise from the principle. For the most part, he does very little to resolve these internal conflicts. In cases such as these, vast areas of his argument's moral foundations dissolve (though usually Nozick manages to undermine his opponents' moral foundations in the process). Nozick does not offer an airtight line of reasoning; and, indeed, this does not seem to be his intention.² His aim appears to be that of offering a theory of minimal government that examines the various moral and practical considerations to be dealt with, and leave the provision of iron-cast solutions to other political theorists.

The Ultraminimal State

One of the most crucial components of Nozick's rejection of anarchy is the process by which an ultraminimal state allegedly arises from the "invisible hand" of the

² In the Introduction to his 1981 book, *Philosophical Explanations*, Nozick emphasizes that his purpose is not to put forth a "coercive" philosophy, which compels his readers to accept his conclusions, but rather a pluralistic one. He writes, "the view that philosophy is a theory of self-evident fundamental principles and their consequences, for example, seems neither to be self-evident nor derivable from such." Thus: "The explanations to follow are put forward not as the sole correct view on their topics, but as members among

market. Since Nozick does not attempt to construct a moral argument against anarchy, his justification for the State resides with the notion that it would emerge “on its own,” without gross violations of the moral premises Nozick, as well as most other Libertarians adhere to. A detailed description of the political evolution Nozick proposes will be helpful in evaluating his argument.

In Nozick’s State of Nature, we are presented with a hypothetical, politically unorganized region where several different protective agencies (and their clients) co-exist. Because of their geographical proximity, inter-agency conflict is unavoidable. Nozick offers three possible outcomes to such a conflict. The first scenario he proposes involves violent conflict: the agencies do battle, and the winner absorbs the clients of the defeated agency, which is effectively annihilated. The second scenario also presumes that violence will result; in this case, however, both agencies are equally strong, especially on their “home turf.” No decisive winner emerges from the battle, but each agency accrues significant power in the geographical region immediately surrounding it; therefore, the clients of both agencies relocate to their respective agency’s “center of power,” and something akin to state boundaries are established.^{xvi} The third scenario is the only non-violent one that Nozick offers. In this scenario, the agencies have frequent conflicts in which they win and lose in approximately equal proportions. In order to avoid such conflicts, the agencies either agree to set up (and abide by the rulings of) a third-party arbiter, or they establish rules concerning which agency has jurisdiction under which circumstances.^{xvii} What Nozick is trying to establish is that in *all three cases*, several competing agencies are ultimately reduced down to a single effective (and therefore “legitimate”) agency. In the first case, a single agency comes to dominate the entire geographical region in question; in the second case, the different agencies divide up the region such that each has a “monopoly on force” in its particular territory; in the third case, the result of these interagency agreements is the establishment of “one federated judicial system,” which, argues Nozick, translates to a “single” agency.^{xviii} Nozick’s point is that the anarchic State of Nature is necessarily a transitory one, due to the nature of the service offered by the competing protective agencies:

others of admissible classes, with the hope that they will be ranked first, or at least highly.” (*Philosophical Explanations*, pp. 23.)

In each of these cases, almost all the persons in a geographical area are under some common system that judges between their competing claims and *enforces* their rights. Out of anarchy, pressed by spontaneous groupings, mutual protection associations, division of labor, market pressures, economies of scale, and rational self-interest there arises something very much resembling a minimal state or a group of geographically distinct minimal states.^{xix}

At this point—the emergence of the ultraminimal state—Nozick’s argument relies solely on the neutral forces of choice and conflict; concepts of rights and obligations have yet to enter the picture. With this in mind, it is best that his argument be judged solely on the plausibility of the process he describes.

The first thing that must be addressed is Nozick’s description of the private protective agencies themselves. While Nozick admits that, in some cases, different agencies, when dealing with a conflict between their respective clients, will make the same “ruling” on a case, he attributes most importance to the cases where they do not. Although it is perfectly reasonable to assume that disparate rulings would arise, it seems unlikely that they would occur with sufficient frequency to be relevant to the anarchic situation. Obviously, Nozick assumes that the clients of different agencies will interact; therefore, we must question Nozick’s almost exclusive focus on interactions of conflict, rather than of exchange and cooperation. It seems far more plausible that most clients would interact under circumstances of economic and social exchange, and therefore, would prefer to avoid conflict (especially of the lengthy and costly sort) in the first place. When conflict did occur, it would be in their best interests to resolve it as quickly and efficiently as possible. Thus, it is highly unlikely that the agencies would arrive at an irresolvable difference of opinion on a case involving their clients. If these individuals must interact with each other in an economic and social context, they would probably avoid patronizing an agency that issued decisions clearly biased in favor of its own clients. To belong to such an agency would almost certainly hinder any individual’s economic and social interactions with others, as they would be perceived as risky. In this

vein, Fielding makes an excellent point in his article, “The Role of Personal Justice in Anarcho-Capitalism.” He points out that any judge—or, in Nozick’s case, agency—who is apt to deliver biased decisions in favor those who pay him (whether under the table, as in the case of bribery, or legitimately, as with Nozick’s protective agencies scenario) is unlikely to stay in business very long. If the bias is overt—for instance, common legal sentiments are explicitly flouted, or the paying client is *always* victorious—people will avoid patronizing such a judge, for fear of being generally recognized as unfair to deal with. If the bias is subtle, and the benefits small, then it seems unlikely that briber (the client) would go out of his way (and risk his reputation) to secure such minimal benefits. If the bias is subtle and the benefits significant—and such an instance seems rare—we must keep in mind that, in a scheme of private enforcement agencies, the losing client *still* has recourse to a private appeals arbiter. In the case of a government-run judicial system, on the other hand, the losing party’s options are far less abundant. In the first place, he has but one “agency” to hear his case, and if he is unsatisfied with the outcome of that hearing, his demand for an appeal must be made to the same agency that originally tried his case, and his chances of gaining such an appeal are relatively unfavorable.^{xx}

Nozick’s description of private protective agencies emphasizes the prosecution and retribution aspects of their services, and in this regard they are far more “State-like” than the typical private business. Nozick insists that private agencies would probably prohibit individual defense against or retaliation to rights-violations because they would fear “counter-retaliation” on the part of the other agency or its clients, thus increasing their own costs.^{xxi} This kind of policy, however, seems far more consonant with the goals of a statelike entity than one whose primary goal is efficiency, rather than the maintenance of control. It is likely that the competing protective agencies would have pre-established policies regarding what kind of private self-defense or retaliation was allowable; and in cases where the private actions were unjustified (according to mutually agreed-upon standards) the damaged parties could prosecute them after the fact. In his article, “Robert Nozick and the Immaculate Conception of the State,” Murray Rothbard predicts that those agencies who forbid individual retaliation and defense on the part of their clients would be outcompeted by rival agencies who allowed it, not only because the

clients themselves would prefer such a policy, but because such prohibiting agencies would incur greater overall costs.^{xxii}

The three scenarios of interagency conflict that Nozick offers follow naturally from his statelike conception of protective agencies. Rothbard notes that the “physical battle” scenarios Nozick presents belie any sense of economic efficiency on the part of the agencies; why would they not agree upon an arbitration process (perhaps provided by another agency altogether) *in advance*, before any conflicts had arisen? The concrete mechanics of such interagency wars are also cause for skepticism. Presumably, the only clients with any strong interest in forcing the other agency to accept their agency’s ruling in the case of conflict would be the disputing parties themselves. What kind of battle, then, could take place between the protective agencies? In the anarcho-capitalist State of Nature that Nozick allows, all property is either privately owned or unowned; the agencies have no “territory” save whatever private property houses their business office. Therefore, it would be unlikely for any sort of traditional “battle” to take place anywhere but on the private agency’s company property, or, perhaps, on the property belonging to the conflicting clients. How would “victory,” under such circumstances, be declared? More importantly, where would the funds for this physical confrontation come from? Agencies with an interest in maintaining enough profit to stay competitive and economically viable would—if they opted to fight at all—try to curtail the duration and intensity of the conflict as much as possible. Unlike a state, a private agency could not simply “tax” its clients to support its war effort; indeed, any significant raise in price would almost certainly drive an agency’s clients to take their business to less conflict-prone agencies. Thus, when we realize that these private protective agencies are profit-driven and beholden to the desires of their clients—who are consumers, not subjects—the less likely Nozick’s “physical battle” scenarios become.

Nozick’s third scenario is somewhat more plausible, though it is interesting to note that Nozick still insists that the agencies would conflict with one another on a regular basis before a non-violent solution was proposed. His prediction that the agencies would agree to certain arbitral procedures is plausible enough; the next step in his argument, however, is completely unwarranted. From the agreement of two conflicting agencies on an arbitral procedure (such as a particular third-party judge), Nozick

concludes that a “system of appeals courts and agreed upon rules about jurisdiction and the conflict of laws” would evolve.^{xxiii} This is quite a leap, especially considering that in Nozick’s State of Nature, more than two competing protective agencies would exist. It is likely that each agency would come to an agreement about arbitral procedures and jurisdiction with each agency it dealt with, but in no way would this imply that a “system of appeals courts” had spontaneously emerged. Moreover, even if we assume that only two relevant protective agencies exist, and that they enter into an agreement regarding a third-party arbiter and rules of jurisdiction, we cannot necessarily conclude that such agreements establish anything with the permanence or finality of a governmental regime. One must keep in mind that a multitude of competing arbiters would exist, and that once the agencies had agreed upon one, they would not necessarily keep that particular arbiter. The agencies themselves would not exist as monolithic entities, either; a change in management might significantly shift arbitration policy. For Nozick to take this idea even farther, and claim that these agreements signify the emergence of a “unified federal judicial system” is, in Rothbard’s words, a “giant leap” in logic.^{xxiv} Roy A. Childs, Jr., in his article “The Invisible Hand Strikes Back,” points out that Nozick’s claim that a set of agreements on arbitral proceedings equals a “federated judicial system” is little more than an empty tautology.^{xxv}

Thus, when the likelihood of Nozick’s three scenarios is undermined, much of argument that competition among private protective agencies would necessarily lead to dominance and then exclusive (territorial) monopoly falls apart as well. Nozick maintains that “unlike other goods that are comparatively evaluated, maximal competing protective services cannot coexist; the nature of the service brings different agencies not only into competition for customers’ patronage, but also into violent conflict with each other.”^{xxvi} Therefore, in Nozick’s scheme, the protective-services market is a zero-sum game; the strength of one agency is inversely proportionate to the strength (combined and individual) of its competitors.^{xxvii} The only actual “evidence” Nozick provides—apart from mere assertions about the economics of protection—is his description of the possible scenarios to arise when agencies’ clients come into irresolvable conflict. Rothbard notes that Nozick’s comments about the protection market being an “economy of scale” draw support from neither economic theory nor practical observations. Indeed,

Rothbard points out that, according to Nozick's theory, a far more likely candidate for an "economy of scale" would be the insurance industry; and yet we find that, today, numerous insurance agencies are able to coexist.^{xxviii}

This is not to imply that Nozick's vision of protective agencies engaging in violent conflict and territorial battles is an impossible one. A multitude of non-monetary considerations enter into the economic calculations of individuals, and the prospect of certain psychological gains and losses has the capacity to completely overshadow the importance of monetary ones.^{xxix} On the other hand, the theory of rational, profit-driven behavior dominating the market does not require that individual actors be rational and motivated solely by monetary gain. One must assert only that those actors who tend to act rationally and with regard for profit *most of the time* will comprise the majority of those operating on the market. Those who consistently make decisions detrimental to profit—or who lack the rational capacity to formulate plans that will secure profit—will more than likely be those who either have exceptional business circumstances (which do not occur frequently) or those who stay in business for a brief period of time. Thus, while it is likely that, *ceteris paribus*, the market—including its protective services component—will be driven by generally rational and profit-seeking individuals, Nozick's scenarios cannot be completely discounted. However, in order for his scenarios to come about, the circumstances would almost certainly have to contain more variables than simply two (or more) rival protective agencies attempting to secure the most customers. In order for such agencies and their client to be willing to support a physical confrontation against their rivals, a strong psychic motivator must be at work. The battle's anticipated increase in psychic utility must outweigh the anticipated disutility resulting from monetary loss. Perhaps an agency would uphold a persuasive religious or moral doctrine, and its clients—the convertees to this belief—would be willing to forego monetary or material gain in order to advance "the cause." Perhaps an agency would successfully convince its clients of its own "legitimacy" (as compared to other agencies) and they, in turn, would be willing to fight to maintain the agency's existence and even its domination over other agencies. In cases such as these, Nozick's agencies might indeed come into violent conflict with one another and eventually produce the State.

In order to undermine Nozick's attack on anarchy, the probability of efficient market behavior need not be proven to weigh heavily against that of violent conflict. All that is needed to damage Nozick's argument is the presentation of viable alternatives to the allegedly necessary outcomes he proposes. The force of Nozick's reasoning depends on the necessity of physical conflict between the protective agencies.³ If alternative outcomes—ones that are not only reasonable, but likely—are presented, then Nozick's invisible-hand explanation loses much of its persuasive power.

The Minimal State

Once Nozick has used his invisible-hand process to bring about the ultraminimal state, he undertakes to prove that it would be "morally impermissible" for such a state *not* to transform into the redistributive minimal state.^{xxx} In order to accomplish this, Nozick outlines a set of rights and obligations that individuals in his State of Nature are presumed to have. There are two major components to evaluating Nozick's progression from the ultraminimal state to the minimal state: first, the moral premises he asserts must be examined in light of their coherency and internal consistency; and, second, we must examine how well the institutions Nozick develops conform to the moral premises he establishes.

Nozick identifies several kinds of rights and duties. For now, they will be examined only for content; later on, we will examine their underlying moral foundations.

The first right we encounter is the right to prohibit risky behavior. Nozick argues that individuals have rights against certain kinds of moral "boundary-crossings"^{xxxi}; this includes actions which, taken without the consent of the victim, impinge upon the individual's moral boundaries (for example, the right to be secure in one's person and property). It should be noted that Nozick includes in this right the right to prohibit activities that cause fear on the part of the general population.^{xxxii} Based on the right of individuals to be free of (most) invasions of their "moral space," the dominant protective agency-cum-ultraminimal-State has the right to prohibit the kinds of activities that risk

unacceptable boundary-crossings. Singled out as a particularly risky behavior is the employment of judicial procedures that (compared to other procedures) tend to punish a greater number of innocent parties, or to “overpunish” the guilty ones.^{xxxiii} Nozick argues that the ultraminimal State has the right to prohibit independents from using judicial procedures that it judges as “unreliable and unfair.”^{xxxiv} Nozick emphasizes that the dominant agency/ultraminimal State does *not* have the right to exclude independents’ judicial procedures “arbitrarily,” but that, in all likelihood, it would prohibit even those procedures that were similar to its own.^{xxxv}

Closely tied to this right is Nozick’s notion of “procedural rights.” Nozick maintains that everyone who comes under the jurisdiction of a particular “procedure of justice” has the right to information sufficient to demonstrate that the procedure in question is “reliable and fair”—at least as compared with other such procedures.^{xxxvi} Because all individuals possess this right, no one may apply a “risky” procedure to others.

It is Nozick’s “principle of compensation” that is most crucial to the movement from the ultraminimal to the redistributive minimal State. Because of the dominant agency’s right to prohibit “risky” behavior, those independents who are barred from exercising their own protective and judicial procedures will be significantly disadvantaged. Therefore, the dominant agency is obligated to compensate those non-clients (independents) who now have no protective services. The most cost-efficient way to do this, Nozick argues, is to provide them with protective services free of charge; otherwise, the dominant agency would be compelled to compensate such independents (whom they have deprived of protective services) *after* a violation of rights had occurred, which would probably be far more expensive.

Given this foundation of rights and obligations, Nozick’s transition to the minimal State is almost effortless. The right to prohibit risky behavior allows the dominant protective agency to ban competing agencies as well as independents from exercising protective rights and judicial procedures and the principle of compensation requires the agency to compensate those it has disadvantaged by this prohibition. Without delving into the validity of the moral reasoning underlying Nozick’s rights theory, we will now examine the implications of the rights and obligations he asserts.

Nozick argues that *not all* moral violations—and, by extension, not all risky acts that might lead to such violations—ought to be prohibited. Because the driving force behind the prohibition of *any* risky activity is the desire to prevent boundary-crossings, it would be absurd, Nozick argues, to prohibit *every* action that risked such a violation. Such stringent prohibitions, he argues, would “incorporate large amounts of risk and insecurity into people’s lives,” since they would constantly be in fear of violating these rules and being punished accordingly.^{xxxvii} Nozick points out that there are cases where obtaining the victim’s consent for a “boundary crossing” is impossible, but the benefits of the act of violation far outweigh any damages that might be incurred in the process. For example, the individual might be unconscious, or unable to communicate with anyone unless his “boundary” is first violated.^{xxxviii} Thus, certain boundary violations are allowed, so long as compensation is paid afterward. Actions that bear significant risk of moral violations (a manufacturing process that pollutes, for example) could also be allowed, as long as: (a) the benefits are such that the action is able to “pay its way,” in terms of compensation^{xxxix}, and (b) the action is not of the sort that will cause “general anticipatory fear.”^{xl}

In examining the coherency of Nozick’s moral theory, we will, for the moment, leave aside the issue of his moral foundations and examine only the internal consistency and implications of the rights and duties he proposes. Nozick’s differentiation between actions that are “officially” prohibited, and those that are allowed as long as compensation is paid to any party whose “moral space” is violated because of it has an interesting effect on the prohibiting rights he bestows upon the dominant agency. Although Nozick emphasizes the element of generalized fear (of “risky”—or even unknown—procedures used by independents or competing agencies) as one of the reasons why the dominant agency would be justified in prohibiting independent procedures, it seems equally possible that the general population would fear the establishment of a monopoly agency (and perhaps the eventual development of a State).^{xli} Such a sentiment would directly counter the dominant agency’s attempt to establish itself as the sole legitimate enforcer of protective and judicial procedures. Once Nozick allows the sensation of “fear” on the part of the population as a justification for prohibiting independent procedures, numerous examples that would negate Nozick’s ultramiminal

State arise. On the other hand, delimiting the application of this formulation so that it works only to the advantage of the would-be State smacks of the arbitrary. Even if we discount Nozick's "fear" clause, we must also consider the objective risk of allowing a single protective agency to drive out all competition and establish its procedure as the sole legitimate one. In examining the dominant agency's "right" to prohibit independents' competing procedures, we must, as Nozick suggests, weigh the potential benefits against the risks. Can allowing competing protective agencies to operate and enforce their procedures deliver enough benefits to outweigh feelings of insecurity and/or fear in the population? It seems quite probable that this would be the case, especially considering what practical evidence tells us about the effect that a business' monopoly status has on the quality and cost of its services.

Nozick's notion of a right to prohibit "risky procedures" requires a host of rhetorical flourishes on his part. His moral theory explicitly states that *everyone* has the right to prohibit judicial procedures they perceive as "risky"; however, the evolution of the dominant agency into a full-fledged State cannot proceed if independents are equally enabled to prohibit the dominant agency's procedure, as it is to prohibit theirs. Nozick attempts to escape this conundrum by stating that although everybody *theoretically* possesses this right, the dominant protective agency is "unique" insofar as it is the only entity with the *capacity* to enforce its prohibitions.^{xlii} Therefore, Nozick concludes, while everyone *possesses* this right, only the dominant agency is able to *exercise* it.^{xliii}

Taken in isolation, this clause seems fairly reasonable; however, when applied to other rights—and to the idea of morality in general—it becomes highly suspect.⁴ As an example, let us examine the right Nozick posits against having an "unreliable and unfair" judicial procedure used against oneself, and the right to sufficient information demonstrating the soundness of the procedure.^{xliv} It is highly improbable that every individual will have the *power* to compel others to refrain from imposing an unfair procedure, or to provide information about the procedure. It is far more likely that those individuals in a position of economic or social power would be able to exercise such

⁴ The Kantian (rather than Utilitarian) moral foundation that Nozick accepts clearly indicates that moral laws are to hold absolutely—without reference to specific circumstances, consequences, or individuals. In *Fundamental Principles of the Metaphysics of Morals*, Kant writes: "[A] duty is to be a practical,

“rights,” while those with little or no clout in society would possess the right only in theory. More generally, we can examine the right of every individual to be free of assault. While all may *theoretically* possess this right, in an isolated situation, we can predict that the stronger (or better-armed) individual will be the only one with the capacity to exercise his “right.” In both these scenarios, it becomes obvious that it is absurd to use the term “right” when such a right is contingent upon the individual’s ability to enforce it.

Beyond such theoretical complications, however, there still remains the problem of application. Nozick’s failure to provide specific definitions of some of the terms he uses leaves open to question the concrete outcomes of his theory of rights. Although Nozick asserts that no one has the right to use a relatively unfair procedure, he offers no definitive standard for judging such procedures. In fact, he emphasizes the difficulty of setting such a standard. He points out that since “utilities differ among persons,” a simple calculation of how effectively a procedure deters crime versus how strong its safeguards are against wrongful convictions is of little value.^{xlv} Formulas such as “better m guilty go free than n innocent are punished,” he observes, will simply reflect arbitrary societal preferences, rather than objective standards of justice.^{xlvi} The “right” that Nozick establishes for individuals to have access to “sufficient information” about the procedure falls prey to a similar dearth of meaning. Who determines how much information is “sufficient”? If an individual under indictment (a non-client, perhaps) maintains that the procedure he is being subjected to is unfair and unreliable, what moral obligations arise on the part of the enforcing agency? While Nozick makes it very clear that an individual who finds the procedure being applied to him to be unreliable and unfair may justly “resist” the proceedings, it is difficult to determine the moral obligation of the party *enforcing* the procedure.^{xlvii} Yet another moral formulation to dissolve into meaninglessness, upon closer scrutiny, is Nozick’s assertion that while the dominant agency has the right to exclude other procedures it judges as “risky,” it may not do so “arbitrarily.” Who is to be the judge of what is arbitrary exclusion, and what is legitimate exclusion? It would seem that no matter how outlandish an exclusion appeared to be, the

unconditional necessity of action; it must therefore hold for all rational beings (to whom an imperative can apply), and for this reason only be also a law for all human wills.” (From Section II.)

dominant agency could insist that it had fairly considered the issue before arriving at its decision; indeed, it would be difficult to verify the factuality of *any* assertion made about one's internal mental deliberations. Nozick's comment that the dominant agency's power (as compared to independents and competitors) "makes it the arbiter of correctness" with regard to which procedures may be banned does little to clarify the issue.^{xlviii}

Critics of *Anarchy, State, and Utopia* have lodged similar complaints. Roy A. Childs points out that Nozick never draws a "clear and unambiguous" line between actions that may justifiably be prohibited and those that may not be.^{xlix} Given that Nozick is advocating a strictly limited form of government, determining where this line lies is particularly important. Childs also objects to Nozick's use of "risk" as a standard for prohibition and compensation. Besides the obvious difficulties that lie in any attempt to quantitatively calculate risk, there is also the fact that risk is a condition that manifests in numerous facets of human life. Why, Childs asks, does Nozick focus on risk (or fear) of unjust punishment as significant enough to warrant the establishment of "rights" against it? Similar conditions of risk arise when an individual is not guaranteed the food needed to live—and this, certainly, generates uncertainty and fear—but Nozick does not propose a "right against starving to death."^l Indeed, we must ask what it is about the protective agency, in particular, that grants it the right to prohibit risky behavior. If one company came to dominate another market—for instance, the car-manufacturing market—would it have the right to prohibit the manufacture of cars by companies it had determined to use "risky" methods of production, or to turn out unreliable vehicles?

Nozick's principle of compensation is most problematic of all. Full compensation may be said to occur, he argues, when the individual being compensated is left, after all is said and done, "no worse off than he otherwise would have been..."^{li} Using the language of economics, the compensated individual is left on "at least as high an indifference curve" as he would have been if he had not experienced the violation and subsequent compensation.^{lii} The principle of compensation demands that any violation of another's moral boundaries (whether prohibited or not) be followed by compensating the victim for the losses incurred. This principle also allows certain boundary violations as long as those violated are fully compensated. (It also seems to allow Nozick to posit the existence of a "right" which results in a violation of a "moral boundary,"—namely, the dominant

agency's right to prohibit procedures it views as risky.) The problems inherent in Nozick's principle of compensation begin with the sense in which the word is used. "Full compensation" demands that the victim be rendered as well off as he would have been had the violation never occurred. While Nozick admits that certain violations preclude the possibility of compensation, he insists that compensation is possible in the majority of situations, including a particularly significant one: the dominant protective agency's enforcement of its monopoly on protection. Given what we know about individual valuation and the changeability of valuations over time⁵, the notion of "full compensation" is nothing more than an abstraction. In the case of compensation for a personal violation such as a broken arm (Nozick's example^{liii}), the arbitrary nature of compensation is easy enough to apprehend: To say that a broken arm "equals" \$2,000 is obviously an approximation at best, and an unfounded, arbitrary assertion at worst. The only situation in which one might accurately assert that a broken arm is worth \$2,000 is one in which person *A* enters into an agreement with person *B*, whereby the former allows the latter to break his arm for the sum of \$2,000. Indeed, even in this situation, the "broken arm=\$2,000" equation is limited to the parties involved and the duration of the deal. (Three years later, for instance, person *A* might not take *any* price for his broken arm; or person *B* might not be willing to offer more than \$100 for such a "commodity"). In the case of compensation for property damages (for example, the theft of an object or sum of money, or the destruction of property), the difficulty inherent in "compensation" is less apparent. One can always argue that by paying the victim the current "market price" for the property that was lost or damaged, the victim is thereby fully compensated. Such an argument, however, ignores the psychic value that the owner attaches to his property. The owner's valuation does not derive from the market price on a particular object; rather, the "price" he would sell it for *is determined by* the current value he attributes to it.^{liv} To complicate matters even further, an individual's valuations are not

⁵ Mises expresses this truth in *Human Action*: "two acts of an individual can never be synchronous. If in one action *a* is preferred to *b* and in another action *b* to *c*, it is, however short the interval between the two actions may be, not permissible to construct a uniform scale of value in which *a* precedes *b* and *b* precedes *c*. ...All that the example proves is that value judgments are not immutable and that therefore a scale of value, which is abstracted from various, necessarily nonsynchronous actions of an individual, may be self-contradictory." He adds, "In acting, which is necessarily in the temporal order, there cannot be any question of...consistency. Acting must be suited to purpose, and purposefulness requires adjustment to changing conditions." (Mises, *Human Action*, pp. 103).

constant from moment to moment; they may alter drastically as time progresses and the circumstances around (and within) him change. The only “sure” indication that an individual is being fully “compensated” by the price offered is when the individual voluntarily engages in the trade. Unfortunately, such a situation defies the very idea of compensation, which takes place either non-voluntarily (such as in the case of the minimal state offering independents its services), or after the fact. Questioning the victim as to how much his damaged or lost items were “worth” to him would be fruitless, since it would be in the victim’s interest to set the price as high as would be believable. Nozick’s employment of the concept of compensation “depends on people’s utility scales being constant, measurable, and knowable to outside observers, none of which is the case,” as Rothbard notes.^{lv} As Rothbard points out, compensation is a method of restitution *after* someone’s rights have been transgressed; it does *not* justify the transgression retroactively.^{lvi} Nozick’s allowance of certain rights-violations provided the victims are “fully compensated” therefore misses the point of compensation.

It is interesting to note that Nozick rejects H.L.A. Hart’s “principle of fairness” for the same reason that many Libertarian critics would reject Nozick’s “principle of compensation.” Nozick repudiates the idea—found in both Hart and Rawls’ thought—that when an individual receives benefits from a cooperative venture, he is obligated to abide by the rules set down by that venture, regardless of whether he voluntarily agreed to participate:

One cannot, for whatever one’s purposes, just act so as to give people benefits and then demand (or seize) payment. ...So the fact that we partially are ‘social products’ in that we benefit from current patterns and forms created by the multitudinous actions of a long-forgotten people...does not create in us a general floating debt which the current society can collect and use as it will.^{lvii}

Rothbard’s case against Nozick’s compensation principle sounds remarkably similar: “I must not be permitted to cavalierly invade someone’s home and break his furniture, simply because I am prepared to ‘compensate’ him afterward,” he writes.^{lviii} It

is interesting to note that while Nozick rejects the idea that each individual is in “debt” to all those who have contributed to the various facets of his life, Bertrand de Jouvenel, who similarly defends the minimal State, embraces this idea. In *Sovereignty*, he rejects the notion that “man is born free” as nonsensical if “taken literally as a declaration of original and natural independence.”^{lix} Man can never escape his debt (and, consequently, his obligations) to those who have directly and indirectly contributed to his life; the essence of a man’s freedom, therefore, does not lie in being free of obligations, but rather in being “his own judge of his obligations, when none but himself compels him to fulfil [sic] them.”^{lix}

Nozick’s use of the compensation principle to incorporate the redistributive elements of the minimal State is equally problematic. Nozick argues that the best way for the minimal State to compensate the independents is for it to provide them with its protective services. The first question that comes to mind, upon examining this statement, is whether Nozick’s compensation scheme *actually* compensates the independents. Does it truly make them at least as well off as they were before being disadvantaged by the minimal State’s intrusion into their lives? Rothbard notes that, in the case of “dedicated anarchists” (for whom the emergence of the State would be a catastrophe), no compensation (in the sense that Nozick uses the word) is possible.^{lxi} The minimal State’s very existence would be so emotionally damaging to such individuals that the State’s offer to include them in its citizenry as compensation would likely strike them as more of a punishment than a compensatory measure.^{lxii} In the case of those who simply do not like the dominant agency-cum-State’s procedures (and who would have purchased different services from a competitor), the most plausible avenue for compensation would seem to lie in awarding them a sum of cash. As Rothbard observes in his critique of Nozick’s theory of compensation, “advocates of the compensation principle have demonstrated that cash—which leaves the recipients free to buy whatever they wish—is far better from their point of view than any compensation in kind.”^{lxiii} This would provide a far greater opportunity for such individuals to return to the level of well-being they occupied before the State’s prohibitive decrees.^{lxiv} In the case of individuals who did not purchase the dominant agency’s services because the price was too high, the opportunity for compensation seems far more likely, but raises complications of its own.

The only knowledge we have of these individuals' preferences is that the dominant agency's services were priced too highly; we have no way of knowing what price they would have considered favorable enough to make the purchase. And, since we cannot assume that these individuals all possess the same utility scales, in order to truly compensate, then the "amount" of compensation offered this group could not be uniform. Each individual would have to be compensated by the exact amount of disutility he incurred due to the State's prohibition.^{lxv} It is especially important to note that Nozick stresses that "compensation" means compensation for the *disadvantages* a person incurs as a result of the prohibition of his behavior (or the violation of his rights)—as compared to a "normal situation."^{lxvi} For example, if a person has been forbidden from earning a living in a way that puts others at significant risk, then, argues Nozick, relevant information in determining compensation includes whether that was the person's *only* way to earn a living, or whether it was simply one option among many.^{lxvii} It is easy to see how this caveat applies to the minimal State's duty to compensate the independents that refused to buy its services. If person *A* would have purchased the dominant agency's protective services but for a slight difference in dollar amount, then his compensatory needs are relatively low. If person *B*, on the other hand, far preferred the kinds of services offered by a competitor agency, then his compensatory needs are significantly greater.

We must also note that Nozick restricts the right to prohibit (and compensate for the resulting disadvantages) to cases where the benefit of prohibiting outweighs the disadvantages incurred (and thus the amount of compensation due to the victims.) He states: "If people's increased security from a contemplated prohibition would benefit them less than those prohibited would be disadvantaged, then potential prohibitors will be unable or unwilling to make sufficiently great compensatory payments; so the prohibition, as is proper in this case, will not be imposed."^{lxviii} With this limitation imposed on the right to prohibit, several instances come to mind in which Nozick's dominant agency would *not* be allowed to establish its monopoly. If a group of anti-Statists exist who insist that the dominant agency's prohibition of their own procedure severely disadvantages them all, and that the cost of compensating them will be extraordinary (and not attainable by compensation in kind, as Nozick suggests), would

not the agency (and its clients) opt against this prohibition? What if the “risks” imposed on the general population by this particular group were minimal? It would seem that a significant amount of risk would have to exist before the agency and its clients could rightfully prohibit independent procedures.

Nozick maintains that others (that is, the dominant agency and its clients) are entitled to prohibit independent procedures if many such independents exist who are “all liable to punish wrongly” thereby creating a “dangerous situation for all.”^{lxix} At this point, problems of definition and delimitation manifest once more. When Nozick refers to the calculation of the benefits of decreased risk versus the disadvantages imposed by the prohibitive measures, it is unclear *who* is determining the weight attached to particular risks and disadvantages. Despite Nozick’s earlier mention of the dominant agency being the only entity with the power to *exercise* its right to determine and prohibit “risky” procedures, it seems highly inappropriate to apply the standard of “might makes right judgment” in this case. Presumably, the dominant agency has an interest in paying as little compensation as possible to those it disadvantages through prohibition. It is not the case that “disadvantages” can be objectively ascertained by simple observation and calculation; nor can the “benefits” of decreased risk be quantified. Even if we assume “good faith” on the part of the dominant agency, the necessity for outside parties to judge the benefits and disadvantages—both material and psychic—remains, and the dominant agency must keep in mind the potential for lying or exaggerating on the part of the independents. Since interpersonal comparisons of individuals’ utilities is impossible,^{lxx} arriving at an objective evaluation of the benefits and costs of compensation (based on the disadvantages produced) seems highly unlikely in this case.

The Legacy of the Minimal State

Several critics^{lxxi} have pointed out that, even if the minimal State could emerge in the manner Nozick describes, many unresolved issues remain. The most obvious question is that of the State’s relationship to the general population. Once the dominant agency has taken on the guise of a State, what is the status of those who were its clients?

Does their status differ from those who are merely compensated independents? What is the status of those who are employees of the agency? Do they comprise a privileged class? Do the President and Vice-President of the agency hold privileged positions in Nozick's society? Moreover, if the population simply remains a group of consumers, is it not their right to stop patronizing the dominant protective agency once its services are no longer satisfactory, or desired? How are crucial decisions—such as which independents to compensate for “disadvantages” and how its services are to be produced and distributed—made? Given that the State is a business—run by a President, executives, employees, etc.—it cannot be assumed to have any sort of governmental infrastructure. This would seem to exclude, or at least render improbable, the possibility of democratic representation, or voting to pass laws, or a doctrine of the separation of powers. Childs succinctly summarizes these concerns:

Professor Nozick's State is private property. It was, one recalls, a private firm, an agency, which developed by a series of specifiable steps, into a State. It remains private property, then, since nothing was done to change matters. ...One is justified in assuming that its owners, the board of directors, (stockholders or whatever) are aggressive businessmen driving towards 'expansion' of their business. There is no question of a constitution, of course, merely the contracts with its clients, which in case of conflicts it alone can judge and interpret. There is no voting. There is no separation of powers, no checks and balances. ...There is merely a private agency, now with a monopoly on power, on the use of physical force to attain its ends.^{lxvii}

If Nozick's State functions poorly as a government, it fares even worse as a business. Once the dominant protective agency has outlawed its competitors and compelled independents to accept its services, it functions on the market as an entity that is qualitatively different from businesses supplying other goods and services. Presumably, the State must either raise its prices or decrease the quality of its services in

order to pay for the free services it provides the disadvantaged independents. We might also ask whether its employees—or even its owner—may “quit” or demand higher salaries, which would certainly affect clients. What if profits atrophy due to compensation such that the owner and/or the stockholders decide that it is no longer a profitable venture? May any of them sell the State? If the State raises the price of its services—or takes away some portion of the services it used to offer, while maintaining the same price—is this not equivalent to taxation? (Later on, we will explore Nozick’s condemnation of taxation.) Childs makes the argument that if such changes in service or price take place, it is likely that a sizable portion of those who voluntarily purchased the dominant agency’s services would now join the ranks of those who would *not* have done so.^{lxxiii} He asks whether they, too, be compensated for the disadvantages of being barred from patronizing competitor agencies more to their liking.^{lxxiv} And if such compensation is delivered in the form of free protective services, would the resulting hike in price or decrease in service not push *more* of the agency’s “voluntary clients” into the class of those disadvantaged by the minimal State’s prohibition of competition? Childs argues that it is precisely this kind of domino effect that could lead to the demise of the State—ironically enough, by the same “invisible hand” process that established it in the first place. The need to compensate an increasing proportion of the population could eventually lead “to the point where no one but a few wealthy fanatics advocating a minimal State would be willing to pay for the greatly reduced ‘services’ of government.”^{lxxv}

We must also ask how the State determines how much protection (and arbitration) to supply its clients and compensates. Because the dominant agency’s consumers are no longer able to express their preferences through their purchasing decisions, the State has no indicators to guide its production. While a competitive business takes its information regarding prices and products from market “signals,”^{lxxvi} the State, having effectively eliminated the free market for protective services, is forced to unilaterally determine consumer preferences. Furthermore, because the minimal State’s “clients” constitute a sure source of revenue, the minimal State no longer has an incentive to produce and deliver its services efficiently; its coercive power gives it access to almost unlimited

resources.^{lxxvii} Nozick's minimal State effectively combines the worst elements of both government and business.

The issue of the minimal State's territory is not sufficiently addressed by Nozick. He makes it clear that allowing patches of independents within the "boundaries" of the State would be problematic; there would be no way to contain the independents' use of arbitration and retaliation procedures and retaliation against the dominant agency's clients, especially given technology such as helicopters and airplanes. A "Swiss cheese" State would not be feasible, according to Nozick; the prohibitions enforced by the dominant agency must be aimed at all independents acting in the region, regardless of whether they assert a "border" internal to the dominant agency's territory.^{lxxviii} Such an policy, however, raises the question of how far the minimal State's territory must extend. In the case of a dominant protective agency *before* it has asserted the right to prohibit the procedures of independents that might come into contact with its clients, its "territory" would be comprised solely of its clients' private properties. Once the dominant agency has evolved into a State, however, its territory must cover any area inhabited or frequented by those who might interact with its clients. After it takes the next step, and compensates the independents by offering its protective services free of charge, its boundaries must extend even further, for all those who interact with these compensated independents must also be prohibited from using their "risky" procedures, and then compensated in turn. Ultimately, any individual who may potentially interact with those covered by the protective agency's services (both clients and ex-independents) must be prohibited from using his own protective services and procedures, and then compensated for his disadvantages. Thus, as James Dale Davidson observes in his "Note on *Anarchy, State, and Utopia*," in order for Nozick's minimal State to consistently follow through with its "right to prohibit" and "principle of compensation," it must expand its territory indefinitely.^{lxxix}

Finally, we must ask what happens to the minimal State with the progression of time. When children are born to clients of the agency (or its compensated independents), what is their status? If they consider the existence of the minimal State favorably (as would voluntary consumers), at what point do they begin to pay for its services? If they do not wish the purchase the State's services, are compelled to do so, or are they

compensated for the prohibition against independent procedures with free service? If the latter is the case, we can easily imagine the emergence of two distinct classes in Nozick's minimal State: those who voluntarily pay for its services, and those who accept such services free of charge (or perhaps at a reduced price). We are also forced to wonder how employees are replaced, once they have either quit (assuming this is possible) or died. Are such positions of authority within the minimal State transmitted hereditarily—so that an aristocracy of civil servants emerges—or do the agency's managers, stockholders, or owners hire a new employee out of the pool of clients (a.k.a the "citizenry")?

Thus, in final examination, it would appear that Nozick's dominant protective agency evolves into something that is neither an effective business, nor a particularly desirable State.

Conclusion: Nozick's Invisible-Hand Explanation

From the very beginning of his argument, Nozick emphasizes that his invisible-hand explanation is not an attempt to present things as they actually happened, but rather things as they *could* have happened. The "hypothetical history"^{lxxx} he offers, though quite possibly inaccurate, "pack[s] explanatory punch and illumination."^{lxxxi} What relevance, then, does the accuracy or inaccuracy, plausibility or implausibility of Nozick's hypothetical history, have in terms of our evaluations of the actual institutions today? Nozick argues that, in the case of a hypothetical history that justifies an institution not with reference to consent, but rather through some other process, the institution may be judged according to one's evaluation of the process.^{lxxxii} If one judges the process to be just, then an institution whose provision of rights and duties closely resembles the provision of rights and duties allocated via the hypothetical history, also may be said to be just.^{lxxxiii} In the case of Nozick's hypothetical explanation, the "just process" in question is the "invisible hand" of the free market and unhampered individual choice. Much like Rawls' method in *A Theory of Justice*, Nozick's hypothetical explanation helps us to articulate the values and processes we consider just, and then check our current institutions against those. Given this disclaimer, criticisms such as Rothbard's

that Nozick could lend moral support *only* to those States arising via his invisible-hand process are misinformed.^{lxxxiv}

However, if the significant element in Nozick's hypothetical history is that—at least initially—it is guided by an “invisible hand,” we must determine whether what takes place is indeed an invisible-hand process. That is, do market forces alone bring about (at the very least) the ultraminimal State out of anarchy? In order to assert that the crucial transition from anarchy to the ultraminimal State is an invisible-hand process, we must be able to show that this transition was brought about by the sum of uncoerced individual preferences as expressed on the free market. That is, we must be able to show that this is what men *would* do, not what they *ought* to do.^{lxxxv} In order to show this, we must first remove the moral components from Nozick's argument, for these are normative, not practical assertions. Upon removing elements such as the right to prohibit risky behavior and the right to a “fair” procedure, however, Nozick's hypothetical history appears to become mired in the State of Nature. Without the “right to prohibit,” the dominant protective agency is merely the most successful business in its sector of the market; there remains the possibility of competitors emerging and flourishing, or of independent individuals continuing to use independently-devised procedures. The crucial factor in the transition from anarchy to the ultraminimal State is the dominant agency's right to prohibit risky behavior. What must now be determined is whether—barring any assertions of “rights”—the dominant agency *would* (since this is an invisible-hand explanation) prohibit competitors and independents from using their own procedures. Let us imagine how a dominant protective agency might go about this. It announces to its customers that in order to increase their security and decrease the risk that they might be subjected to a potentially “unfair” or “unreliable” alternative procedure, it will now enforce its monopoly by actively prohibiting all other agencies and individuals from employing their own procedures and punishing any that do so. It is possible that its clients (not to mention non-clients!) might react negatively to this, suspicious its desire to delegate itself such authority. However, for argument's sake, let us assume that their clients do not have any theoretical or moral objections to such a policy; the agency is now free to establish and enforce its prohibitive measures. In order for its policy to be more than an aggressive assertion, the agency must acquire the means to do the

following: (a) discover the existence of competitor agencies or independents who maintain their own procedures; (b) evaluate each alternative procedure as either acceptable or unacceptable, so that it does not simply ban them arbitrarily; (c) subject those accused of employing an unapproved alternative procedure of justice; and (d) carry out its designated punishment against those who are found guilty of violating the prohibitive rules. It is not a stretch of the imagination to say that these functions will require the expenditure of significant resources. How will the agency pay for these new duties that it has foisted upon itself? It is likely that an increase in price (or decrease in the quality of services offered) will occur, and that its clients will react negatively, perhaps by refusing to purchase the agency's services in the future and seeking out an "underground" competitor. If a sufficient number of clients are dissatisfied and cease to purchase protection from the dominant agency, then the agency will eventually lose its status as the dominant one, and therefore its capacity to prohibit. Therefore, we must conclude that, in the unlikely case of a dominant agency deciding to enforce prohibitive measures against competitors, the "invisible hand" of consumer preference and economic reality will soon dismantle its monopoly. As mentioned earlier, however, the introduction of a new variable to this scenario, such as the development of an ideology of State legitimacy, or a religious imperative to support the dominant agency as a State, could shift the outcome of forces in favor of Nozick's ultraminimal State. Even if this were the case, though, the use of the term "invisible-hand" seems to be a bit of a misnomer. As Childs points out in his critique of *Anarchy, State, and Utopia*, every step taken toward the establishment of the ultraminimal State implies "an insidious but rather explicit decision," and *not* the impersonal forces of the market.^{lxxxvi} Thus, although the dominant agency may not enforce such a policy with the clear intention of establishing itself as a state, "the *state-like action* of prohibiting competition is still the outcome of a *specific decision*."^{lxxxvii} The movement of the "hand" is therefore not invisible at all, but obvious and deliberate.

The most troublesome aspect of Nozick's argument for the minimal State is his combination of a nonmoral explanation with an explicitly moral one. The ultraminimal State's justification lies in the fact that it could have arisen through the "invisible hand" of choice—an explicitly non-moral force. Nozick is careful not to argue the immorality

of anarchy, and therefore his argument for the establishment of the ultraminimal State is morally neutral, deriving its justification from the fact that it comes about through what men *would* do. When Nozick approaches the construction of the redistributive minimal State, however, he advances an argument dependent on several explicitly moral principles; its justification lies in what men *ought* to do. The disparity between these two lines of argument immediately prompts us to ask why Nozick did not simply begin with a set of moral principles to bring about the ultraminimal State; or, conversely, why Nozick did not simply explain the evolution of the minimal State with reference to nonmoral market forces. Indeed, the shift in tactics midway through his argument suggests the inadequacy of both methods. It also opens up the door for advocates of both the “maximal State” and the state of anarchy to make their own cases using Nozick’s methods. If morals are to enter into the argument, then what would prevent a supporter of the welfare state to supply his own moral principles (many of which closely resemble, at a fundamental level, those Nozick adheres to⁶) and assert that a dominant protective agency would be “morally required” to evolve into the maximal State? Similarly, could the advocate of anarchy not assert that his set of moral principles precludes an ultraminimal State from emerging in the first place? Such an advocate might even use Nozick’s own risk-prevention principle to assert that individuals, fearing the risks associated with large amounts of power accruing to a single entity, would actively prevent any single protective agency from growing too large or too powerful.

Ultimately, Nozick’s argument fails to consistently present a genuine “invisible-hand” process; and, where it succeeds in doing so, this angle of argument is called into question by Nozick’s later assertions of the importance of the operation of moral principles on political development. Although Nozick’s argument does not rely on historical validity for its legitimacy, in order to be successful, it must present a plausible “hypothetical history” in which the State could emerge without violating individual

⁶ Rawls—through his “original position”—adheres explicitly to Kant’s categorical imperative: “Act only on that maxim whereby thou canst at the same time will that it should become a universal law.” Nozick, on the other hand, expresses a significant degree of implicit agreement with the categorical imperative insofar as the moral questions he poses (for example, is it “right” for an innocent convict to resist punishment?) demonstrate an acceptance of the necessity of universalizing (at least among humans) ethical principles. Kant’s practical imperative—“So act as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as means only.”—is explicitly adopted by both. (From Kant’s *Fundamental Principles of the Metaphysics of Morals*, 1785.)

rights. Because Nozick fails to accomplish this, the anarchist challenge remains unanswered.

ⁱ Nozick, Robert. *Anarchy, State, and Utopia*. New York: Basic Books, 1974, pp. 26.

ⁱⁱ Nozick, pp. 26-7.

ⁱⁱⁱ Nozick, pp. 108.

^{iv} Brownlie, Ian, *Principles of Public International Law*. New York: Clarendon Press (1979), pp. 74.

^v Brownlie, pp. 76.

^{vi} Kelsen, Hans, *General Theory of Law and State*. New York: Russell and Russel (1961), pp. 9-10.

^{vii} Kelsen, pp. 253.

^{viii} Nozick, pp. 23.

^{ix} Ibid.

^x Ibid.

^{xi} Nozick, pp. 24.

^{xii} Ibid.

^{xiii} Nozick, pp. 15.

^{xiv} Nozick, pp. 26.

^{xv} Nozick, pp. 52-53.

^{xvi} Nozick, pp. 15.

^{xvii} Ibid.

^{xviii} Nozick, pp. 16.

^{xix} Nozick, pp. 16-17.

^{xx} Fielding, Karl, "The Role of Personal Justice in Anarcho-Capitalism." *Journal of Libertarian Studies*, Vol. 2, No. 3 (1978), pp. 240.

^{xxi} Nozick, pp. 15.

^{xxii} Rothbard, Murray, *The Ethics of Liberty*. New York: New York University Press (1998), pp. 233.

^{xxiii} Nozick, pp. 16.

^{xxiv} Rothbard, Murray, "Robert Nozick and The Immaculate Conception of the State," *Journal of Libertarian Studies*, Vol. I, No. 1 (1977) pp. 3.

^{xxv} Childs, Roy A., "The Invisible Hand Strikes Back." *Journal of Libertarian Studies*, Vol. I, No. 1 (1977) pp. 26.

^{xxvi} Nozick, pp. 17.

^{xxvii} Ibid.

^{xxviii} Rothbard, "Robert Nozick and the Immaculate Conception of the State," pp. 3-4.

^{xxix} Mises rejects the idea that the monetary value of a commodity infers its value. He writes: Preferring always means to love or desire *a* more than *b*. Just as there is no standard and no measurement of sexual love, of friendship and sympathy, and of aesthetic enjoyment, so there is no measurement of the value of commodities. ...It is certain that every act of preferring is characterized by a definite psychic intensity of the feeling it implies. There are grades in the intensity of the desire to attain a definite goal and this intensity determines the psychic profit which the successful action brings to the acting individual. But

psychic quantities can only be felt. They are entirely personal, and there is no semantic means to express their intensity to convey information about them to other people." (*Human Action*, pp. 205-6.)

xxx Nozick, pp. 56.

xxxi Nozick, pp. 57.

xxxii Nozick, pp. 66.

xxxiii Nozick, pp. 88.

xxxiv Nozick, pp. 102.

xxxv Nozick, pp. 108-109.

xxxvi Ibid.

xxxvii Nozick, pp. 71.

xxxviii Nozick, pp. 58-59.

xxxix Nozick, pp. 72.

xl Nozick, pp. 69.

xli Rothbard, *The Ethics of Liberty*, pp. 238.

xlii Nozick, pp. 108-9.

xliii Ibid.

xliv Nozick, pp. 102.

xlv Nozick pp. 97.

xlvi Nozick, pp. 96.

xlvii Nozick, pp. 102.

xlviii Nozick, pp. 118.

lix Childs, "The Invisible Hand Strikes Back," pp. 4.

l Childs, "The Invisible Hand Strikes Back," pp. 6.

li Nozick, pp. 57.

lii Ibid.

liii Nozick, pp. 66.

liiv Mises emphasizes that values exist in the valuer alone. He asserts that "[v]alue is not intrinsic, it is not in things. It is within us. ... It is reflected in human conduct. It is not what a man or groups of men say about value that counts, but how they act." (*Human Action*, pp. 96.)

lv Rothbard, *The Ethics of Liberty*, pp. 241.

lvi Rothbard, *The Ethics of Liberty*, pp. 240.

lvii Nozick, pp. 95.

lviii Rothbard, *The Ethics of Liberty*, pp. 241.

lix Jouvenel, Bertrand de. *Sovereignty*, pp. 261.

lx Jouvenel, pp. 262.

lxi Rothbard, *The Ethics of Liberty*, 242-3.

lxii Childs, pp. 5.

lxiii Rothbard, *The Ethics of Liberty*, pp. 243.

lxiv Ibid.

lxv Ibid.

lxvi Nozick, pp. 82.

lxvii Ibid.

lxviii Nozick, pp. 83.

lix Nozick, pp. 89.

lxx Rothbard, Murray, *Man Economy, and State*. Princeton: Van Nostrand Co. (1962), pp. 15-16.

lxxi Some of these critics include: Murray Rothbard (see his article, "Robert Nozick and the Immaculate Conception of the State"), Roy A. Childs, Jr. (in his article, "The Invisible Hand Strikes Back"), Karen Johnson (in "Government by Insurance Company: The Antipolitical Thought of Robert Nozick"), James Dale Davidson (in "Note on *Anarchy, State, and Utopia*"), and David Osterfeld (see "Internal Inconsistencies in Arguments for Government: Nozick, Rand, and Hospers.")

lxxii Childs, "The Invisible Hand Strikes Back," pp. 5.

lxxiii Childs, pp. 9.

lxxiv Childs, "The Invisible Hand Strikes Back," pp. 5.

lxxv Childs, "The Invisible Hand Strikes Back," pp. 9.

lxxvi Rothbard, Murray, *Power and Market*. Kansas City: Sheed Andrews and McMeel (1970), pp. 176.

^{lxxvii} Rothbard, *Power and Market*, pp. 175.

^{lxxviii} Nozick, pp. 54-55.

^{lxxix} Davidson, James Dale, "Note on *Anarchy, State, and Utopia*." *Journal of Libertarian Studies*, Vol. I, No. 4 (1977), pp. 343.

^{lxxx} Nozick, pp. 293.

^{lxxxi} Nozick, pp. 8-9.

^{lxxxii} Nozick, pp. 293-294.

^{lxxxiii} Nozick, pp. 294.

^{lxxxiv} Rothbard, "Robert Nozick and the Immaculate Conception of the State," pp. 1.

^{lxxxv} Davidson, pp. 341. Davidson quotes Randy E. Barnett's: "At certain stages in his analysis, Nozick discusses the way men *ought* to act in order to remain in conformity with moral principles. In other stages of his analysis, he attempts to describe the way men *would* act in the state of nature. It should be obvious that only the latter components of his argument can properly bear upon the operation of an 'invisible hand process.'"

^{lxxxvi} Childs, "The Invisible Hand Strikes Back," pp. 10.

^{lxxxvii} *Ibid.*

II. Anarchy versus the Minimal State: Other Arguments

Introduction

In *Anarchy, State, and Utopia*, Nozick addresses head-on the moral challenge issued by free market anarchists, namely: How can a proponent of individual rights who condemns state coercion in the economic realm support the establishment of something that can exist only by virtue of its coercive power, i.e., the State?¹ Over the years, minarchists have taken several different avenues of argument. Those from the Randian/Objectivist perspective tend to focus on the necessity of government for protecting individual rights and establishing “objective” law. Others have approached the issue from a cost-benefit analysis stance; they argue that the State is not an intrinsic good, but that it is indispensable to the pursuit of other goods, such as human commerce and wellbeing. Finally, there are those who (sometimes combining elements of other arguments) assert that the creation of the State was a consensual endeavor (created by a “contract” or the “consent of the governed,” for instance) and that anarchists are off-base when they refer to the State as a “coercive” entity.

Given this context, Nozick’s “invisible-hand” argument is unique; however, as we have seen, it runs into some major problems. The minarchist argument must therefore be assessed with reference to other theorists who may supplement some of the weaker points in Nozick’s position.

A Rights-Based Approach

Many proponents of limited government¹ attempt to challenge free-market anarchists on their own turf: the protection of individual rights. Arguments such as these advance two major theses: first, that protection and justice (taken together as “force”) are qualitatively different from all other goods and services offered on the market; and

¹ The essential minarchist position is summed up by John Hospers: “The role of government should be limited to the retaliatory use of force against those who have initiated its use.” (From his article, “What Libertarianism Is,” from Tibor Machan’s *The Libertarian Alternative*, pp.12.)

second, that man's rights or man's nature necessitate the formation of government so that they may flourish.

Arguing from the Randian/Objectivist perspective,² Robert J. Bidinotto gives a particularly detailed account of why he believes that protective services cannot be privatized. His argument attempts to establish that "'force' is not just like any other good or service on the marketplace."ⁱⁱⁱ He identifies several fundamental characteristics that differentiate "protection" apart from other goods and services. First, he observes that supplying "protection" is in fact supply protection of *rights*, and that before this service can be provided, the rights in question must be identified and defined.ⁱⁱⁱ He also points out that in order for protective agencies to be effective, they must be able to *enforce* the decisions and punishments they render in each case. Thus, if the defendant's agency does not concur with the judgments rendered by the plaintiff's agency, no "ultimate agency" can step in and enforce it. Furthermore, Bidinotto argues, because consumers will only purchase the services of those agencies who can effectively protect them (from retribution as well as aggression), no agency will agree to allow its client to be punished, or even charged.^{iv} The market is driven by consumer desires; therefore, Bidinotto argues, if protective services were provided on the free market, they would impose no self-limitations, but would go to any lengths to provide protection, retribution, and favorable judicial outcomes to clients. In the case of limited government, however, the government would be constitutionally limited.^v Thus, while private protective agencies would supply consumers anything they demand, a limited government would restrict its power and the power of its agents.^{vi} Bidinotto also makes that argument that without the State, there would be "no final determiner of law," and therefore no fixed method of settling disputes.^{vii} Thus, Bidinotto concludes that one of three scenarios arises: (a) no agencies are able to enforce their judicial verdicts on any other agency's clients, and therefore such agencies are rendered useless; (b) one dominant agency emerges and enforces its final interpretations of justice on every other agency; or (c) the agencies decide to impose a "mutually-agreed-upon framework" and from those emerges a "single legal system,"

² The reason I have chosen to evaluate the Randian/Objectivist perspective using the article by Bidinotto (rather than Rand herself) is that Rand's major arguments against anarcho-capitalism (found in pages 107-115 of *The Virtue of Selfishness*) tend to mischaracterize the anarchist argument and address it with either

a.k.a., the State.^{viii} Thus, Bidinotto allows two alternatives: ineffectual private protective agencies or the emergence of the State. Bidinotto concludes that the anarchist scenario is impossible, because, in any viable society, “one’s use of force must be judged and evaluated by everyone else in society, by an objective procedure...”^{ix} In contrast to other areas of the market, providing consumers with what they desire in the market for protective services will negatively impact the population as a whole. John Hospers, in his article, “What Libertarianism Is,” also cites the impossibility of the privatization of protection. He writes: “If each individual had constantly to defend himself against possible aggressors, he would have to spend a considerable portion of his life in target practice, karate exercises, and other means of self-defense,” and therefore, “[h]e would have little time for cultivating those qualities which are essential to civilized life...”^x

Minarchists have also made numerous attempts to prove that government (the State) is required to allow man to live according to his “nature.” Bidinotto argues that government—“a means of subjecting might to morality”—is “a basic requirement of human survival.”^{xi} In order to maintain men’s well-being, “objective procedures” must be established to outline which actions are acceptable and which are not, and some means of enforcing “final verdicts” must be available.^{xii} Tibor Machan, writing from a similar point of view, asserts that the political community must be founded on the “requirements of human nature within the context of community life,” which translates to the preservation and protection of each individual’s “life, liberty and property.”^{xiii} David Boaz, in *Libertarianism: A Primer*, argues that governments are formed in order to protect individual rights.^{xiv} The only interactions that should be prohibited by government, Boaz argues, are “those that involve the initiation of force against those who have not themselves used force...”^{xv} Although governments must be established to protect rights, Boaz emphasizes that these rights exist of their own accord, and are not “granted by government.”^{xvi} The government, he adds, is not supposed to emphasize any particular morality, since it cannot assume that all of its citizens share the same values; rather, it should “guarantee each individual the freedom to pursue his own good...”^{xvii}

simple, unsupported assertions or *ad hominem* attacks. Bidinotto’s article offers a much clearer argument against the contentions of free-market anarchism.

Essentially, the minarchist argument boils down to the idea that governments protect men's rights to pursue their own plans without interference.

The Cost-Benefit/Utilitarian Approach

Those who examine the State from a cost-benefit perspective have a two-fold task: first, to establish that the utility or good derived from governmental protection of individuals outweighs the inherent dangers of bestowing power on such an entity, and second, they must argue that keeping such a government minimal (rather than positing the welfare State) is equally beneficial. Unlike Nozick, many of those who advocate the State by virtue of its necessity and/or utility hold as obvious the belief that men require government in order to maintain any sort of civilized existence.^{xviii}

In *Leviathan*, Thomas Hobbes makes the argument that, in the absence of the State, men exist in an intolerable condition of a war of "every man against every man."^{xix} Not only would men be under constant threat of attack, assault, or robbery, there would be no opportunity for them to cultivate a civilization (i.e., the development of law, the pursuit of knowledge, the arts, etc.)^{xx} Therefore, he concludes that it is in the "common benefit" to establish a single power (the State), which is created by the relinquishment of the wills of every individual to its power.^{xxi} He asserts that men must "confer all their power and strength upon one man, or upon one assembly of men, that may reduce all their wills, by plurality of voices, unto one will...and therein to submit their wills, every one to his will, and their judgements [sic] to his judgment."^{xxii} The "cost," in the case of Hobbes, is the restriction of individual liberty, and the "benefit" the promise of security and civilization.

David Hume's *Treatise of Human Nature* explores some of the reasons men might choose to establish the State, as well as what kind of government would properly emerge. He argues that because of man's "natural defects"—namely, his inability to physically protect himself or to instinctually supply himself with food and shelter—it is in his interest to form a society with other men.^{xxiii} This society, however, must be governed by laws backed by force; because men "cannot change their natures," and are confined to a narrow perspective which distorts their ability to secure the general welfare, the

punishment for undesirable behavior must be made to be immediately apparent to the individual, thus compensating for the distortion.^{xxiv} For Hume, the State is not an end in itself, but rather a “mere human invention for the interest of society.”^{xxv} In order for the State to be a just one, it must uphold and protect the principles of “the stability of possession, its translation by consent, and the performance of promises.”^{xxvi} When “security and protection” are no longer adequately provided by the State, individuals are no longer bound to abide by its authority.^{xxvii} According to Hume, the existence of government is therefore only a good when it is advantageous to the interests of human society.

John Locke asserts that all men are born in “perfect freedom” to act and use their property as they see fit. This State of Nature, however, is not a “state of license”; natural law—which may be uncovered through reason—dictates how man ought to act. According to Locke, “no one ought to harm another in his life, health, liberty, or possessions,” unless that person is a criminal offender who ought to be punished.^{xxviii} The only way men’s natural liberty can be bound, argues Locke, is for them to consent to the rules of a community so that they may enjoy greater security in their persons and property.^{xxix} The limitations Locke places on the government correspond to the reason for its formation; since men consented to a government so that they might better secure and use their property, if the State takes a man’s property without his consent, that government is no longer legitimate.^{xxx}

John Stuart Mill, in *On Liberty*, asserts very early on that “[a]ll that makes existence valuable to anyone, depends on the enforcement of restraints upon the actions of other people.”^{xxxi} While Mill does not circumscribe the power of the State as drastically as minarchists such as Hospers and Boaz, the fundamental stance he takes is that the government may only interfere with individuals’ actions when those actions pose a direct (or at least substantial) threat to others.^{xxxii} The arguments Mill employs in support of this position are, naturally, appeals to the utility of the general population. Many tasks which the government could (theoretically) stake out as its exclusive territory are left to the private sphere because they are either done better by private individuals, or because it is “desirable” that individuals should do them, for their own betterment (for their “mental education,” for example.)^{xxxiii} More importantly, certain choices are left up

to the individual because any governmental attempt to regulate them would result in the “great evil of adding unnecessarily to its [the government’s] power.”^{xxxiv} -

In *Common Sense*, Thomas Paine puts forth the idea that men first established a society in order to reap the benefits of interaction, and then recognized that government would be necessary to curtail antisocial behavior.^{xxxv} The fundamental purpose of the government is therefore the establishment of “security,” and this is to be attained with “the least expense and greatest benefit...”^{xxxvi} As with Boaz, Paine insists that the rights of man exist independently of the government protecting them.^{xxxvii}

Ludwig von Mises’ defense of the minimal State (rather than anarchy or the welfare state) rests not on the assertion that the (classical) liberal State is “natural and just” but because it is “beneficial” to mankind—which is to say, it can more efficiently serve men’s interests.^{xxxviii} Mises rejects the anarchist vision as utopian and contingent upon the false belief that men will behave civilly of their own accord, without the coercive power of the government enforcing such behavior.^{xxxix} The State—and the coercive power it holds—is therefore necessary, according to Mises, for the preservation of peace; without it, society “would be exposed to the mercy of every individual.”^{xl} Mises advocates minimal government because it is the most rational and efficient way to fulfill men’s wants and needs. Although Mises’ liberalism does not attempt to establish natural rights or a concept of the good, it does rely on the premise that men prefer “life to death, health to sickness, nourishment to starvation, [and] abundance to poverty.”^{xli} Other political platforms, he argues, abide by these same premises, and market themselves accordingly; they differ from liberalism only because they reason incorrectly as to the means of achieving these goals.^{xlii} Thus, for Mises, the minimal government position is simply the most reasonable answer to the question of how to fulfill men’s desires.

Hayek offers a similar argument in *The Constitution of Liberty*. Because individuals require “protected spheres” in which they can exercise individual will freely (as opposed to being at the mercy of others’ arbitrary whims), the power of an entity such as the State is necessary to achieving this.^{xliii} He argues, therefore, that this freedom from most forms of coercion by others “can be given to him only by some authority that has the necessary power,” i.e., the State.^{xliv} Freedom can be attained within a State, he

argues, as long as “government action is guided by principles” and that government agents do no sacrifice it to expediency, or allow “piecemeal encroachments.”^{xlv}

The Consent of the Governed

Many minarchists have argued that the minimal State could have come about through the consent of the individuals in the State of Nature who perceived the benefits it offered. Usually the “consent” referred to is hypothetical; we are to assume that a “rational” man would have consented to the establishment of the State.

Hobbes argues that men’s desire to escape the State of Nature would have made him “willing, when others are so too, as far forth as for peace and defence of himself he shall think it necessary, to lay down this right to all things; and be content with so much liberty against other men as he would allow other men against himself.”^{xlvi} He adds that when such an agreement has been reached, “it is a real unity of them all in one and the same person, made by covenant of every man with every man, in such a manner as if every man should say to every man: I authorise and give up my right of governing myself to this man, or to this assembly of men, on this condition; that thou give up, thy right to him, and authorise all his actions in like manner.”^{xlvii} Locke, in a similar (though more democratic) vein, argues that once men have chosen to exit the State of Nature and take on “the bonds of civil society,” they become incorporated into “one body politic,” whose decisions are made by the will of the majority.^{xlviii} Through their initial consent to enter this community, Locke argues, individuals incur an “obligation...to submit to the determination of the majority, and to be concluded by it...”^{xlix}

More recently, those who argue for a consensual government have addressed the problem of taxation, as anarchists have pointed out that the State must necessarily obtain the revenues that sustain it coercively. John R. Danley refers to this dilemma as the “Libertarian Paradox.” Danley observes that while minarchists deny that any individual or State has the right to collect and/or redistribute wealth (since this violates property rights), the existence of even a minimal (“night-watchman”) State requires at least some redistribution, in order for it to provide protective services to all those within a territory.¹ Many theorists have attempted to circumvent the problem of State coercion by arguing

that governmental revenue could be acquired voluntarily. Writers such as Hospers and Bidinotto (following Rand) maintain that taxation—coercively seizing an individual's property—is always immoral. (Even Nozick argues that taxing someone is akin to partially enslaving them.)^{li} And yet it is obvious that if the State is to protect people effectively, it requires the resources to do so.

Some writers, such as Rand, contend that “voluntary funding” from middle- and upper-class citizens (presumably those with the greatest interest in protecting property) would fund governmental operations.^{lii} She contends that this would also be an effective way to limit the State's growth, since people would only donate as much money as they felt the government needed to deliver “essential” services.^{liii} Hospers' theory that individuals would patronize the State's protective services as much or as little as they wished is a similar vision of “voluntary government funding.” In Hospers' scheme, the State would offer its services to those who were willing to pay on a service-by-service basis. No one would be compelled to pay for governmental services if they did not want them.^{liv} Additionally, Hospers would allow private police forces to operate (since they would undoubtedly be more efficient), but they would be compelled to enforce only the State's approved laws and procedures. Interestingly enough, Hospers' minimal State looks much like Nozick's ultraminimal State. Some simply contend that taxation really *is* voluntary, since the individuals who are taxed desire the compulsion of the State apparatus so that collective projects may be pursued more efficiently.³

Bidinotto focuses on what he perceives as the problems in anarchist arguments addressing consent and taxation, rather than the dilemmas faced by minarchist theory. While admitting that there are “big problems in staffing and funding” a government while attempting to not violate the rights it purports to protect,^{lv} he criticizes individualist anarchists such as Benjamin R. Tucker and Lysander Spooner for maintaining that, since *they* did not sign the Constitution, they are not bound to obey the State. Bidinotto argues that the Constitution “didn't impose coercive demands on the citizens, or authorize the

³ As an example, we can consider James Buchanan and Gordon Tullock's argument in *The Calculus of Consent*. They argue that, in certain cases, social projects or functions are carried out more efficiently in the public sector. “Collective action is viewed as the action of individuals when they choose to accomplish purposes collectively rather than individually, and the government is seen as nothing more than a set of processes, the machine, which allows such collective action to take place.” (From *The Calculus of Consent*, Ann Arbor: University of Michigan Press (1962), pp. 13.)

government to violate their rights” but rather “ordered its own agents to protect the peoples’ rights, while generally letting them free to go about their business.”^{lvi} Bidinotto demands, “What’s so intrinsically immoral and coercive about this? What requires personal signatures?”^{lvii}

Anarchist Responses

On The Argument From Rights

The difficulty in attempting to assert a theory of rights or natural law will be explored in greater detail in the section on Morality. For now, a few preliminary comments will be made. One of the most obvious difficulties that minarchist theorists run into is that they are burdened with the task of demonstrating the existence of natural rights, if they wish to base their arguments on their existence. Simply relying on their intuitive appeal has the unfortunate effect of backfiring once new rights—entailing the creation of the welfare state—gain similar intuitive appeal. Boaz in particular runs into trouble when he argues that since it cannot be assumed that the population in question share a “complete and exhaustive moral code,” the government must keep the legal obligations to a minimum and impose no “particular morality.”^{lviii} At the same time, he maintains that the government needs to establish a “framework of rules that will guarantee each individual the freedom to pursue his own good...so long as he does not infringe on the freedom of others.”^{lix} The difficulty here lies in how individual citizens define “freedom.” Does compulsory jury duty infringe on individual freedom? If a woman aborts her unborn child, does this infringe on the child’s right to life? Or, conversely, if a woman is prohibited from aborting the child, does this infringe on her freedom to do what she will with her property (i.e., her body and the child within it)? Once pluralistic values enter into a “free society,” creating a “framework of rules” acceptable to all becomes a nearly impossible task.

The problem of providing a plausible foundation for rights is equally apparent in Nozick’s defense of the minimal State. The rights that Nozick establishes are essential to both the establishment of the ultraminimal and minimal State, and to the prevention of

the establishment of a welfare State (this will be described in greater detail in the fourth section). The primary difficulty in establishing a set of rights—or a standard of moral conduct, such as Kant’s practical imperative—is that it is difficult to delimit the application of such rights so that they do not provide support for either a stateless society or a redistributive State. When Nozick asserts the right to prevent risky behavior, for example, it is easy to see how this right could be used to prevent the establishment of an entity with a monopoly on force (which can be judged as risky or fear-generating). Conversely, Nozick’s allowance for the preemptive incarceration of “high-risk” individuals (as long as they are properly compensated) seems to provide a potential justification for a totalitarian society.

The Cost-Benefit Evaluation of the Government

Proponents of the minimal State who refer to the benefits it bestows upon humanity encounter several problems. Utilitarians such as Mill cannot get around the necessity of assigning positive value to certain situations and outcomes so that these may be defined as “benefits.” In doing so, they must make judgments about which things have value and how these values are weighted in comparison to one another. The greatest dilemma facing any cost-benefit evaluation is the determining *who* is to be the valuer, and what standards he adheres to. Once this argument is used to advance a political theory, the difficulty of establishing values in the first place has the potential to stymie any sort of political progress, especially in a pluralistic society.

The argument that Mises makes for minimal government in *Human Action* is relatively sophisticated: while he recognizes that liberalism is not “value-free,” he insists that the values espoused by liberalism—prosperity and freedom—are shared by every political party, whether nationalist, socialist, or fascist.^{lx} The only difference, he argues, is that liberalism advocates a more *successful* way of attaining those values. The disparity lies not in the ends, but in the means—with the classical liberal society and the free market being the *correct* means.^{lxi} The question that immediately comes to the fore is, *are the ends really the same?* Is it really the goal of all political parties to attain “earthly well-being and prosperity” and to “render economic conditions more

satisfying”?^{lxii} Are citizens who align with particular political parties really doing so because their party promises the “highest material welfare”?^{lxiii} One need only examine the platforms and promises of various political parties to realize that, (a) “material welfare” is *not* always the highest, or even a high priority, and (b) definitions of “material welfare” can change from party to party. Boaz articulates the fundamental flaw in Mises’ reasoning:

Mises can demonstrate that price controls will produce shortages, but maybe the advocates of price controls are socialists who want the controls as a step toward total government control of the economy, or extreme environmentalists who deplore excessive consumption and think fewer goods are a great idea, or egalitarians who figure that at least if there are shortages the rich won’t be able to buy more than the poor.^{lxiv}

In a way, Mises does in fact allow for the possibility that the benefits of a minimal rather than welfare State might not be enough to convince people of liberalism’s merit: “It [liberalism] has full confidence in man’s reason. It may be that this optimism is unfounded and that the liberals have erred. But then there is no hope left for mankind’s future.”^{lxv}

On Consent and Contracts

Many proponents of the minimal State incorporate into their theories the idea that men would have created the State because they perceived the benefits it would deliver them, and in doing so, they consented either tacitly or explicitly. This idea serves to legitimate the State and to downplay the coercive role it plays. The idea that men consented to the State, or that the government represents a “contract” between individuals and their rulers has been criticized by several anarchist writers. A number of issues have been raised, including: the definition of ‘consent,’ the duration of a ‘contract,’ and the ahistoricity of the claim.

The term “consent” is rarely defined with precision by those who use it to legitimize the State. Anthony de Jasay attempts to clarify the issue by drawing a distinct

line between the “contract of consent” and what is termed a “social contract.”⁴ He defines the “contract of consent” thusly:

Consent for our purposes is best defined as an accord between state and subject, revocable with little advance notice by either party, whereby the subject adopts some appropriate and favourable attitude ranging from active militant support to passive allegiance, and the state furthers the subject’s specific ends up to limits which are constantly renegotiated in the political process.^{lxvi}

Thus, unlike the social contract, a consenting relationship between state and subject gives the state no new rights or powers; additionally, the idea of consent involves an individual subject or consciously-identified group, rather than “the whole of society.”^{lxvii} When we compare this formulation to the vague implications of Locke or Paine’s notions of “consent,” we can see that the implications of the word “consent” (voluntary, continuing support for the State) differ greatly from the concrete conditions it usually attaches to (namely, subjects are born into a State they neither created nor voluntarily selected and are kept obedient by coercive measures). Lysander Spooner makes similar comments about the definition of consent. He maintains that “consent of the governed” necessarily implies consent of every individual who is required to expend his own resources (either money, through taxation, or time, through “personal service”) to uphold the government and its functions.^{lxviii} In response to those who would argue that such a definition of consent is absurdly stringent, Spooner explores the implications of applying alternative definitions. For example, if consent means “consent of the *strongest party*,” then no limitation can be placed on the form of government that may be called “consensual”; indeed, any despotic regime could be supported.^{lxix} If, on the other hand, consent simply means “consent of the *most numerous party*,” then the basic doctrine of equality among men must be discarded. For, according to Spooner, “two men have no more natural right to exercise any kind of authority over one, than one has to exercise the same authority over two. A man’s natural rights are his own, against the

⁴ Cite Hobbes’ Leviathan definition of the “social contract.”

whole world; and any infringement of them is equally a crime, whether committed by one man, or by millions..."^{lxx} To fortify his point, Spooner turns to the conditions under which the American founding fathers created the U.S. Constitution. Spooner points out that if the "consent of the majority" principle had been explicitly followed, America would never have been formed, "for they [the founding fathers] were in a small minority, as compared with those who claimed the right to rule over them."^{lxxi}

Bidinotto's argument that the Constitution needed no signatures, since it only bestowed rights, rather than taking them away, runs into problems when the case is considered more closely. What Bidinotto seems to be overlooking is that the Constitution's orders that its agents "protect" people's rights necessarily entail the expenditure of resources. It is necessary that these resources be acquired from somewhere, and unless the State acts as a business competing with other protective agencies (which Bidinotto strictly excludes), it must derive its resources coercively; that is, through taxation.⁵ Given Bidinotto's strict adherence to private property rights, it is unlikely that he would deny that the transfer of property—for example, from the individual citizen to the State—requires a "personal signature."

Benjamin Tucker further elaborates on the notion of consent by pointing out that consenting to be part of a "voluntary association" necessarily implies the right to secede from such an association. Tucker presents this scenario: if a group of individuals occupying a particular territory want to form a voluntary protective association, then any non-joining individuals who happen to live within that region cannot, by virtue of their natural freedom, be compelled to leave the territory, or to join the association, or to pay for any "incidental benefits" that the association might accidentally bestow upon them.^{lxxii} Were these conditions to not adhere, then the association could not truly be called a "consensual" or "voluntary" one. Thus, if a member of that voluntary association later decided he did not wish to be a part of it, it is his right to revert back to the state of freedom occupied by the non-joining individual.^{lxxiii}

⁵ Upon reflection, Bidinotto's image of the State is simply absurd. His characterization of the Constitution as merely a document requiring those individuals who compose the government to offer protective services to a certain population—with no corresponding obligations imposed on the citizens themselves—paints the State as a sort of charity organization. Bidinotto's description suggests that it approaches its citizens and offers to protect their rights, demanding nothing in return; and, if the individuals refuse this generous offer,

Anarchists also criticize the “consent of the governed” argument insofar as it is absurd to imagine anyone consenting to a contractual agreement that is not only eternally-binding on the signatory, but on all subsequent generations of his offspring. Spooner points out that even if it were the case that *everyone* existing at the time of the creation of the Constitution had signed it, their signatures would not indicate the consent of those not yet born. If one respects the idea of individual autonomy, it follows naturally enough that those consenting to a contract can bind “nobody but themselves.”^{lxxiv} He also observes that those signing the Constitution did not “pledge their faith *for any specific time*,” and that therefore the relationship between the State and individuals was “merely an association during pleasure.”^{lxxv}

Max Stirner makes a persuasive case for the absurdity inherent in using one’s own capacity for voluntary agreements to henceforth *relinquish* that capacity. In *The Ego and His Own*, Stirner argues that even if it were the case that every subject’s will were in agreement (regarding a particular action or law of the State), it would not necessarily follow that these wills would remain fixed from one day to the next: “Would I not be bound today and henceforth to my will of yesterday? My will would in this case be *frozen*. ...My creature—to wit, a particular expression of will—would have become my commander.”^{lxxvi} The conclusion, he observes, is logically incoherent: “Because I was a willer yesterday, I am today without will; yesterday voluntary, today involuntary.”^{lxxvii}

The final point to be made about theories of consent and contract is their ahistoricity. As Nozick observes in his discussion of hypothetical histories, if “consent” is the justifying factor of a particular institution, and there exist those who did not consent, then the institution cannot be determined as “just.”^{lxxviii} Spooner notes that the number of those who signed the Constitution was “very small” and the idea that its adoption represented an “act of the people” is “the merest farce and imposture.”^{lxxix} A. J. Nock also points to the “positive testimony of history,” which indicates that “the State invariably had its origin in conquest and confiscation.”^{lxxx} Even Thomas Paine, who supported the minimal State, delivers a less than enthusiastic eulogy for William the Conqueror’s famous conquest:

the State simply backs away with its hands in the air, saying, “Sorry, I didn’t mean to bother you; it won’t happen again.”

A French bastard landing with an armed banditti, and establishing himself king of England against the consent of the natives, is in plain terms a very paltry rascally original [sic?]. –It certainly hath no divinity in it.^{lxxxii}

While Nozick's establishment of the minimal State does not rest on a "social contract," his hypothetical history does imply "the consent of the governed" insofar as the dominant agency's original clients supported it through their individual preferences as expressed on the free market. His argument encounters problems when we remove the moral elements, such as the right to prohibit risky behavior. As we saw in the first section, deprived of this "right," it is unlikely that the dominant protective agency would, through an invisible-hand process, evolve into even the ultraminimal State.

Voluntary Taxation

Anarchist critiques of these proposals focus on issues ranging from the concrete difficulties of organizing and implementing such voluntary collections to the charge that, if such a scheme were applied, the State would take on the identity of a private business, thus delivering minarchist theory back into anarchy.

In *The Ethics of Liberty*, Murray Rothbard addresses the claim that taxation really *is* voluntary, since "it is a method for everyone to make sure that everyone else pays for a unanimously desired project."^{lxxxiii} That is, people "voluntarily" agree to be coerced (along with everyone else) into paying for governmental services. Rothbard responds by first making the obvious point that even if the payment of taxes is a coercion of "all-against-all," it still does not classify as "voluntary" payment. More importantly, Rothbard observes that the very presence of governmental coercion precludes the possibility of determining whether the payment was "really voluntary."^{lxxxiii} As Rothbard notes, where no State coercion is involved, an individual's desire to pay a certain amount of money for a particular service is *demonstrated* by the concrete act of doing so. As soon as the variable of coercion is added, the possibility of making such a claim disappears. Rothbard also points out that if even one anarchist existed within the State in

question, the argument that taxes are “really voluntary” would fall apart.^{lxxxiv} In response to the argument that a person’s ability to vote (for particular representatives or governmental actions) makes his payment of taxes voluntary, Rothbard observes that even nonvoters (by choice or by law) and those who voted on the losing side are compelled to contribute funds.^{lxxxv} It is particularly significant that one cannot vote to eliminate taxes, or to disband the government; thus, the act of voting cannot be taken as an implicit endorsement of taxation, or the government itself. In the same vein of thought, Spooner argues that since taxes are compulsory regardless of whether one votes, it is possible that many people vote simply to “prevent their own money being used against themselves,” and that such an action cannot be construed as a token of support.^{lxxxvi}

The idea that a minimal State could be voluntarily funded by its (relatively wealthy) citizens comes under equal criticism. The crux of this argument lies in the idea that since the middle- and upper-class citizens have the greatest interest in protecting their persons and property, they would be willing to support a minimal State. In *Power and Market*, Rothbard observes that this contention does not survive close scrutiny. He notes: “it is precisely the rich who could more afford to pay for their own protection and who therefore derive less benefit from it [the State’s police protection] than the poor.”^{lxxxvii} It seems highly unlikely that those with enough means to support the functioning of a State would patronize such an inefficient entity, when they could as easily afford private protective services. Rothbard also points out that in voluntary as well as compulsory taxation, “payment is severed from receipt of service, in striking contrast to the market where payment and service are correlative.”^{lxxxviii} Thus, the wealthy individuals who funded the government would expect certain protective services to be provided in exchange for payment, but they would have no way of knowing precisely where *their* money was going. And with no correlation established between how much money the individual donated, and how much service they receive in return, individuals would tend to “reduce their payment,” until the system collapses under the weight of its free-riders.^{lxxxix}

Taking Hospers’ argument as an example, we are forced to wonder *how* the State would enforce its monopoly on law-making. If a competing protective agency (which is

legitimate under Hospers' scheme) were to gain all of the State's customers—thereby robbing it of any revenue—how would the State continue to enforce its law-making monopoly? How would it assert its authority as lawmaker against a rival agency with more resources and more customers? Thus, Hospers' attempt to enforce strict moral limitations on State power has the unfortunate effect of weakening it to the point where it is no longer recognizable as a State. In fact, it is difficult to see how Hospers' State differs from the private police agencies it allows, other than the fact that, for some reason, it has the power to lay down the law.

Finally, as Morris and Linda Tannehill point out in *The Market for Liberty*, the fact that taxes are paid voluntarily, or that the State's services are purchased piecemeal does not get rid of the element of coercion that minarchists profess to reject. Even if the government allowed people to fund it voluntarily, or did not force anyone to buy its services, in order to qualify as a State, it would still have to prohibit competition from other protective agencies in within its "territory."^{xc}

Nozick's attempt to maintain both the immorality of taxation and the possibility of a quasi-redistributive minimal State runs into similar problems. Ultimately, he seems to simply ignore the issue of how the State would gain its revenue, assuming that the State's coercion would be limited to the prohibition of competitor agencies or independent individuals, and that its payments from its "clients" would continue to arrive voluntarily even after it implemented compensatory redistribution.

The Neutral State

One of the major criticisms leveled against anarchism is that it would result in chaos; there would be no "objective law," or "final arbiter" in situations of conflict.^{xc1} Minarchists argue that with no higher authority, people would simply assert their own interests against others, and the more powerful individual would win. Indeed, this is the main focus of Bidinotto's argument against anarchy. Anarchists generally respond to charges such as these in one of two ways: they either challenge the notion that the State is (or can be) a neutral third-party to disputes, or they assert that a framework of laws can indeed emerge without a coercive final arbiter.

Men in governmental positions of governmental authority are still just men, anarchists observe. Hans-Hermann Hoppe, in his article, “The Private Production of Defense,” argues that the Hobbesian contention that person A and person B require a third-party, S, to resolve their disputes is simply absurd when followed to its logical conclusion.^{xcii} Since S is just a man like A and B, if he encounters other rulers (termed S1, S2, and S3) then they, too, would seem to require yet another higher authority to resolve their disputes.^{xciii} Thus, the Hobbesian premise ultimately leads to the idea that a single world-government must be established in order to ensure peaceful relations among men. In the case where the government is *not* a dictatorship, but rather is composed of many individual agents, interactions between those who do not have a direct commander-and-subordinate relationship is equally anarchic. In his article, “Do We Ever Really Get Out of Anarchy?”, Alfred G. Cuzan points out that “there is no ‘third party’ to make and enforce judgments among the individuals who make up the third party itself.”^{xciv}

There is also the troubling question of how men will behave once they are governmental agents. We must first recall that although a government official has access to various resources (i.e., those funded by the citizenry), he *owns* neither the resources at hand nor the product they fund (e.g., the police force.) Therefore, unlike the individual owner of private property, the government official has very little incentive to either allocate resources efficiently or maximize the value of the product; this is especially true of those officials whose time in office is limited or contingent on re-election. Furthermore, as Rothbard points out, even the most “entrenched civil servant” has no possibility of selling the property in question, nor any liability for financial losses due to poor resource allocation, and so he, too, has little incentive to act efficiently.^{xcv} It is far more likely, Rothbard argues, that he will attempt to extract any value possible for himself while in office, regardless of long-run considerations.^{xcvi} Nock, for example, observes that the actions of the State differ little with regard to who is elected to office, for “*man tends always to satisfy his needs and desires with the least possible exertion.*”^{xcvii} Given this fundamental truth, the State will tend to “*maximize expenditures on production...and at the same time...minimize the production of protection.*”^{xcviii} And, as Rothbard points out, *why* would those in positions of governmental authority desire to play neutral arbiter in the first place? Rothbard contends that “given the unchecked

power of the State, the State and its rulers will act to maximize their power and wealth, and hence inexorably expand beyond their supposed ‘limits.’”^{xcix} Thus, in answer to Bidinotto’s contention that “surely no private company would deliberately handcuff itself,”^c anarchists such as Rothbard respond that the same caution applies to the State and its agents *a fortiori*.

Still, anarchists must answer the challenge offered by the many States who do voluntarily impose limits on their power, the primary example being the U.S. and its Constitution. Anarchists have furnished two major responses to this. First, the State’s tendency to absorb more and more power and wealth does not necessarily imply a conscious effort on the part of its leaders to create a juggernaut. The State is in many ways *precluded* by virtue of its monopoly status from acting efficiently; unlike competitive businesses on the market, it has no consumer demand or profit-and-loss signals to guide its operation. Anthony de Jasay points out that even if we assume in “good faith” that the State is both unselfish and impartial with regard to the goals it is to implement using taxpayer funds, it is still forced to “weight” these goals and to determine how to maximize them.^{ci} Thus, even “the most unselfish state could not pursue other ends than its own.”^{cii} Moreover, we must keep in mind that the State does not—even in the most hierarchical of dictatorships—act as a unified entity; rather, it is composed of many different agents, all of whom have their own agendas, prejudices, and interests to serve. As an example, we may observe the bureaucrat who does his most to preserve the existence of an essentially useless governmental department because it is his department and he has an interest in keeping his job. He is almost certainly *not* acting from the motive to expand governmental power and tap into more taxpayer wealth. The second response drops the “good faith” assumption and attributes the State a calculative intent. This argument, put forth by Jasay, contends that by agreeing to constitutional limitations, the State more effectively quells any opposition to its authority.^{ciii} Using this method, the State advances notions of “the consent of the governed,” and “rule by the people,” to better secure the allegiance of its subjects; this is a far less costly method of keeping order than the threat of physical force.

Thus, in answer to Bidinotto’s contention that society requires an “objective” entity to determine rights and their application, most anarchists point out that the State

can hardly act objectively, even if its intention is to do so. Bidinotto's comparison of a private protective agency to a limited government, upon closer examination, suggests a far different conclusion. Private protective agencies may indeed attempt to expand their power indefinitely, but they, at least, must contend with both the reaction of other agencies and their customers' desire to avoid gaining a reputation as someone who is risky to do business with. The State, on the other hand, has very little incentive to limit its power; even if it initially place limitations on its jurisdiction and authority, this is by no means a foolproof way of ensuring that these limitations are followed. Bidinotto's side-remark that "it's taken lovers of coercion over 200 years to subvert our Founder's system to its current state"^{civ} gives credence to the notion that governmental limits are only as good as those who enforce them. As A.J. Nock observes in, *Our Enemy, The State*,

Everywhere we find the political organization proceeding from the same origin, and presenting the same mark of intention, namely: the economic exploitation of a defeated group by a conquering group.^{cv}

The idea that law is indivisible from the State has been thoroughly challenged in recent years. Rothbard cites the fact that much of the law, and "especially the most libertarian parts of the law," developed from sources other than the State: "tribal custom, common-law judges and courts, the law merchant in mercantile courts, or admiralty law in tribunals set up by shippers themselves."^{cvi} In *Power and Market*, Rothbard argues that a "basic legal code," would emerge among the competing protective agencies and private arbiters.^{cvi} This code would simply be an elaboration on the principle of self-ownership, and—by extension—ownership of property acquired either originally or through voluntary transfer.^{cvi} Roy A. Childs argues that a "market legal system" would arise through the processes of "competition, bargaining, legal decisions, and so forth..."^{cix} A "State legal system," by contrast, is constructed by the "state apparatus" and enforced coercively.^{cx} Out of the individual agreements between private protection agencies and private arbiters, a gradual homogenization would take place, spurred by

their consumers' needs to be able to interact with one another in an economic as well as social sense.

Conclusion

As with Nozick, other minarchist theorists fail to provide an adequate reply to the problems posed by the preservation of individual rights, the consent of the governed, and justifying the State in the first place. Despite this, the anarchist argument does not win out entirely; many of the issues it raises with regard to the minimal State apply with almost equal force to the anarchic free-market ideal. Those anarchists (such as Rothbard) who hold that the preservation of certain rights and liberties are fundamental to a healthy society can offer no guarantee that the stateless legal norms that would evolve through consumer preference would reflect such rights and liberties. Although it is possible that free-market legal norms would reflect the Libertarian preservation-of-person-and-property ideal, it seems equally possible that the population would desire legal sanctions to be applied to those practicing an unpopular religion or lifestyle. While anarchists might respond to this by pointing out that people would be most likely to only expend their resources on "crimes" where tangible damage to person or property has occurred, it must be recalled that the non-material (i.e., psychic) values could potentially exert equal influence on individuals' actions.

ⁱ Nozick, pp. 27-28.

ⁱⁱ Bidinotto, Robert J, "The Contradiction in Anarchism," (1994) p. 7. Available At: <http://www.vix.com/objectivism/Writing/RobertBidinotto/ContradictionInAnarchism.html>.

ⁱⁱⁱ Bidinotto, pp. 2-3.

^{iv} Bidinotto, pp. 4.

^v Bidinotto, pp. 3.

^{vi} Bidinotto, pp. 4.

^{vii} Bidinotto, pp. 5.

^{viii} Bidinotto, pp. 5-6.

^{ix} Bidinotto, pp. 10

^x Hospers, John. "What Libertarianism Is." From *The Libertarian Alternative*, Machan, Tibor, Ed. Chicago: Nelson-Hall Company (1974), pp. 12.

^{xi} Bidinotto, pp. 9.

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- ^{xii} Bidinotto, pp. 9.
- ^{xiii} Machan, "Justice, Self, and Natural Rights," pp. 17. Available at: <http://www.chapman.edu/argyros/faculty/machan/justmore.pdf>.
- ^{xiv} Boaz, David, *Libertarianism: A Primer*. Free Press (1998), pp. 17.
- ^{xv} Boaz, pp. 2.
- ^{xvi} Boaz, pp. 64.
- ^{xvii} Boaz, pp. 106.
- ^{xviii} Need ref. To Hobbes (Leviathan); Locke, Hume, etc.
- ^{xix} Hobbes, Thomas. *Leviathan*. Available At: <http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan/c.html>, Ch. 13.
- ^{xx} *Ibid.*
- ^{xxi} Hobbes, Ch. 17.
- ^{xxii} *Ibid.*
- ^{xxiii} Hume, David, *An Enquiry Concerning Human Understand; And Selections from A Treatise of Human Nature*. La Salle: Open Court Pub. Co. (1958), pp. 485.
- ^{xxiv} Hume, Book III, Sect. VII.
- ^{xxv} *Ibid.*
- ^{xxvi} *Ibid.*
- ^{xxvii} *Ibid.*
- ^{xxviii} Locke, "The Second Treatise of Government," from *Two Treatises of Government*. London: Everyman (1993), pp. 117.
- ^{xxix} Locke, pp. 163.
- ^{xxx} Locke, pp. 186.
- ^{xxxi} Mill, John Stuart. *On Liberty*. London: Longman, Roberts & Green, 1869; Bartleby.com, 1999. Available At: www.bartleby.com/130/, ch. 1.
- ^{xxxii} Mill, ch. 1.
- ^{xxxiii} Mill, ch. 5.
- ^{xxxiv} Mill, ch. 5.
- ^{xxxv} Paine, Thomas, *Common Sense*. *The Thomas Paine Reader*, Foot, Michael, and Kramnick, Isaac, Eds. Penguin Classics Edition (1776), p. 67.
- ^{xxxvi} *Ibid.*
- ^{xxxvii} Paine, "Dissertation on First Principles of Government" *The Thomas Paine Reader*, pp. 464.
- ^{xxxviii} Mises, Ludwig von, *Human Action*. New Haven: Yale University Press (1949), pp. 174.
- ^{xxxix} Mises, pp. 148-9.
- ^{xl} Mises, pp. 149.
- ^{xli} Mises, pp. 154.
- ^{xlii} Mises, pp. 180-181.
- ^{xliii} Hayek, pp. 139.
- ^{xliv} *Ibid.*
- ^{xlv} Hayek, pp. 68.
- ^{xlvi} Hobbes, Ch. 13.
- ^{xlvii} Hobbes, Ch. 17.
- ^{xlviii} Locke, pp. 163.
- ^{xlix} Locke, pp. 164.
- ⁱ Danley, John R. "Robert Nozick and the Libertarian Paradox." *Mind*, New Series, Vol. 88, No. 351 (July 1979), pp. 419.
- ⁱⁱ Nozick, pp. 172.
- ⁱⁱⁱ Osterfeld, David, "Internal Inconsistencies in Arguments for Government: Nozick, Rand, and Hospers." *Journal of Libertarian Studies*, Vol. IV, No. 3 (Summer 1980), pp. 336.
- ⁱⁱⁱⁱ Osterfeld, pp. 334.
- ^{lv} *Ibid.*
- ^{lvi} Bidinotto, pp. 12.
- ^{lvii} Bidinotto, pp. 8-9.
- ^{lviii} Bidinotto, pp. 9.
- ^{lix} Boaz, pp. 106.

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- lix Boaz, pp. 106.
lx Mises, pp. 154.
lxi Ibid.
lxii Mises, pp. 180-181.
lxiii Mises, pp. 183.
lxiv Boaz, pp. 83.
lxv Mises, pp. 157.
lxvi Anthony de Jasay, *The State*. New York: Basil Blackwell (1985), pp. 70.
lxvii Ibid.
lxviii Lysander Spooner, "No Treason," (1870) Sect. IV, Available At:
www.lysanderspooner.org/bib_new.htm
lxix Spooner, Sect. II
lxx Ibid.
lxxi Ibid.
lxxii Tucker, Benjamin, "Liberty and Taxation." From Individual Liberty. Available At:
<http://flag.blackened.net/daver/anarchism/tucker/tucker8.html>.
lxxiii Ibid.
lxxiv Spooner, Book 2, Sect I.
lxxv Ibid.
lxxvi Stirner, Max, *The Ego and His Own*. (1907), pp. 256. Available At:
<http://flag.blackened.net/daver/anarchism/stirner/theego0.html>.
lxxvii Stirner, pp. 257.
lxxviii Nozick, pp. 293.
lxxix Spooner, Book 2, Section I.
lxxx Nock, A.J., *Our Enemy, The State*. (1935), Sect 2, Ch. II. Available At:
www.djs.org/daver/anarchism/nock/oets0.htm
lxxxi Paine, *Common Sense*, pp. 76.
lxxxii Rothbard, *The Ethics of Liberty*, pp. 163.
lxxxiii Rothbard, *The Ethics of Liberty*, pp. 163.
lxxxiv Rothbard, *The Ethics of Liberty*, pp. 164.
lxxxv Rothbard, *The Ethics of Liberty*, pp. 165.
lxxxvi Spooner, Book IV, Sect. II.
lxxxvii Rothbard, *Power and Market*, pp. 155.
lxxxviii Rothbard, *Power and Market*, pp. 163.
lxxxix Rothbard, *Power and Market*, pp. 163.
xc Tannehill, Linda and Morris, *The Market for Liberty*. San Fransisco: Fox and Wilkes (1993), pp. 78.
xci Bidinotto, pp. 5.
xcii Hoppe, pp. 28-29.
xciii Hoppe Hans-Hermann, "The Private Production of Defense." *Journal of Libertarian Studies*, Vol. 14, No. 1 (Winter 1998-1999), p. 27-28.
xciv Cuzan Alfred G., "Do We Ever Really Get Out of Anarchy?" *Journal of Libertarian Studies*, p. 152.
xcv Rothbard, *Power and Market*, pp. 188.
xcvi Ibid.
xcvii Nock, Book 2, Sect. III.
xcviii Hoppe, pp. 34.
xcix Rothbard, *The Ethics of Liberty*, pp. 176.
c Bidinotto, pp. 4.
ci De Jasay, pp. 60-61.
cii De Jasay, pp. 59.
ciii Jasay, pp. 191.
civ Bidinotto, p. 4.
cv Nock, Book 2, Ch. II.
cvi Rothbard, *The Ethics of Liberty*, pp. 178.
cvii Rothbard, *Power and Market*, pp. 166-7.
cviii Rothbard, *Power and market*, pp. 3.

^{cix} Childs, pp. 3. This sentiment is echoed in Brownlie's *Principles of Public International Law*: "In both national and international legal history, the mature judicial process develops out of relatively informal administrative and political procedures. International practice has long included negotiation, good offices, and mediation as informal methods of settling disputes. Treaties establishing machinery for peaceful settlement frequently provide for these methods and also for conciliation." (pp. 706).

^{cx} Ibid.

III. Morality: Kantian and Naturalistic

Nozick, Rawls, and the Original Position

John Rawls, in *A Theory of Justice*, examines the same fundamental political question that Nozick attempts to answer in *Anarchy, State, and Utopia*, namely: What moral constraints should structure society? Rawls' approach differs from Nozick's in that he offers a detailed and systematic method of determining individual rights and obligations, whereas Nozick's moral theory takes numerous forays into the various side-issues and hypothetical circumstances that arise through his questioning. Fundamentally, the two do not differ greatly in their sources for morality: both appeal to the generalized Kantian sentiments that most people hold about morals. Nozick draws on our conception of the "meaningful life," which necessitates both individual liberties and constraints on how we may behave toward other people. Rawls uses our "considered convictions of justice"¹ to construct both the process and outcome of his theory. While Nozick identifies and explores such moral sentiments so that he may draw attention to the ambiguities and seeming inconsistencies they possess, Rawls attempts to articulate, clarify, and refine them via his "original position" scenario. Both retain these Kantian premises, but while Rawls spends the bulk of his time trying to ensure their consistency and plausibility, Nozick, after calling them into serious question, preserves them by incorporating caveats and exceptions. The disparity between Nozick's political ideal—a mostly *laissez-faire* society—and that of Rawls—an egalitarian and redistributive society—arises primarily out of this difference in methodology.

This difference would suggest that Nozick simply fails to apply his Kantian moral principles as consistently as Rawls does. As we will see in the following section, this is only partly true, for Nozick's moral theory also serves to *challenge* the viability of the Kantian premises, especially as they are articulated in Rawls' "original position." Thus, while it is true that Nozick does not produce a consistent, fully coherent moral theory, the ambiguities and paradoxes he identifies would seem to undermine the possibility for *any* logically coherent theory of human rights and the "good."

In examining Rawls' expression of Kantian moral foundations through his original position, I will argue that his formulation fails in both the political and moral realm. I will then turn to the question of whether attempts to advance naturalistic theories of the "good"ⁱ are able to provide better support for the Libertarian position. In evaluating such attempts—especially those that posit "life" as the ultimate value or standard of morality—I will argue that in attempting to escape the dilemmas of a Kantian moral foundation, naturalistic moralities face the dilemma of either falling prey to the "naturalistic fallacy" and exiting the ethical realm altogether, or falling back upon non-falsifiable assertions. I will also point out that these theories cannot escape incorporating an "original position" of their own into their arguments. Finally, I will make the argument that "life" cannot be coherently or realistically employed as a standard of value. Thus, after thoroughly examining the viability of the consistent naturalistic and Kantian approaches to morality, it may very well turn out that Nozick's less-than-airtight theory of rights and obligations at least has the virtue of owning up to its ambiguities.

Rawls' Original Position and Kantian Moral Theory

In order to best articulate and systematize our "intuitive judgments" about justice and how it should be achieved in society, Rawls constructs a hypothetical situation (the "original position"), which, he argues, both expresses and helps to refine our fundamental beliefs about morality and justice.ⁱⁱ We will first examine the concrete particulars of Rawls' construct, and then look at how it expresses Kantian moral principles.

In Rawls' hypothetical situation, we are to imagine several self-interested and mutually disinterested parties deliberating over which fundamental principles should guide the form and function of society.ⁱⁱⁱ Rawls dubs this the "original position," or "initial situation," and it is unique in that the individuals must reason and decide from behind a "veil of ignorance."^{iv} The parties have no knowledge of their race, class, social status, wealth, or natural abilities. They do not know what their particular "conceptions of good" are, nor are they aware of any "special psychological propensities," such as

ⁱ Naturalistic theories differ from moralities such as Kant's in that they attempt to define the "good" with reference to perceivable qualities and attributes, rather than asserting that the good resides in a

religion.^v Although they possess general knowledge of the facts of human society (economics, politics, etc.)^{vi}, they do not know to which historical period or generation they will belong.^{vii} Because they know the “general facts of moral psychology,” they can be assured, argues Rawls, that once the principles of justice are established, they will generally be followed.^{viii} What little can be said of the parties in the original position is that they are rational, self-interested, and aware that they will desire greater (rather than fewer) “social goods” with which to pursue their rational “plan of life.”^{ix}

Rawls emphasizes that his original position does not gain its justification from its resemblance to other “social contract” or “state of nature” hypothetical beginnings; rather, it is meant to be a more concrete exposition of the guidelines underlying the construction of moral theories in general. This concept is explored in some detail in the precursor article to *A Theory of Justice*, “Justice as Fairness.” He explains: “The procedure whereby principles are proposed and acknowledged represents constraints, analogous to those of having a morality, whereby rational and mutually self-interested persons are brought to act reasonably.”^x Rawls’ original position therefore acts to “force” people to see from a moral perspective—that is, one which looks beyond narrow individual interests:

[E]ach will be wary of proposing a principle which would give him a particular advantage, in his present circumstances, supposed it to be accepted. Each person knows that he will be bound by it in future circumstances the peculiarities of which cannot be known, and which might well be such that the principle is then to his disadvantage. ...Hence each person will propose principles of a general kind which will, to a large degree, gain their sense from the various applications to be made of them, the particular circumstances of which being as yet unknown.^{xi}

metaphysical realm not accessible by reason. G.E. Moore explains that they “declare that no intrinsic value is to be found except in the possession of some one *natural* property...” (From *Principia Ethica*, pp. 39.)

It is not expected, Rawls adds, that individuals sacrifice their interests to the “general good”; indeed, he stresses that those in the original position are exclusively motivated by self-interest. However, the circumstances of the original position require that the individuals make a “firm commitment in advance” to principles that—under possible unforeseeable conditions—will be to their disadvantage.^{xii}

Rawls’ moral theory is thoroughly Kantian, though, unlike Nozick, his purpose is to express its tenets in a clear and systematic way. Three major Kantian themes can be found in Rawls’ original position: (1) the necessity of universalizing principles of action, (2) the idea that morals are laws to which one binds oneself in advance, and (3) the stipulation that moral laws be binding and applicable regardless of the concrete circumstances or the desires of the individual.

In his *Fundamental Principles of the Metaphysics of Morals*, Immanuel Kant identifies the categorical imperative (an action “necessary of itself without reference to another end”^{xiii}) as this: “Act only on the maxim whereby thou canst at the same time will that it should become a universal law.”^{xiv} It is readily apparent how this principle informs the construction of Rawls’ original position. Because of the “veil of ignorance,” parties in the original position *are* “universalized” insofar as they must propose principles of justice with the knowledge that they could end up in *any* position in their potential society. Much like Kant’s admonishment to act only according to principles they, too—and, indeed, the entire population—could be subjected to, Rawls places his deliberating individuals in a situation where the principles they agree to will be applied to them no matter what their circumstances or interests. The difficulty in Kant’s formulation lies in the fact that an individual attempting to act morally must try to “escape” his self-interested perspective and reflect without bias on what kind of treatment is just. Instead of trying to assert a non-selfish view of human nature that most would find implausible, Rawls attempts to bypass this task by mitigating the effect of self-interest, rather than trying to diminish or negate it. Thus, in the original position, individuals are still selfish, but their “interests” have become so generalized as to produce judgments in line with Kant’s categorical imperative.

Because Kant's moral theory rests on the idea that moral worth is derived from the intent of the action (namely, *duty*)^{xv}—rather than its consequences—it is crucial that an individual establish his principles of action *before* he is confronted by a particular set of circumstances and the desires that arise in response to it. Therefore, in order to properly act on a principle of morality from duty, we must be “subjected too [sic] it without consulting self-love; as imposed by us on ourselves, it is a result of our will.”^{xvi} Rawls, echoing this idea, argues that “having a morality is analogous to having made a firm commitment in advance; for one must acknowledge the principles of morality even when to one's disadvantage.”^{xvii} The parties in the original position are compelled to emulate this behavior, since the principles of justice they establish ultimately evolve into laws in the literal, rather than philosophical, sense of the word. Rawls' individuals therefore act morally not out of a sense of duty (which Kant describes as, “the necessity of acting from respect for the law”^{xviii}) but from the coercion of the State apparatus that enforces these morals.

Kant emphasizes that moral principles must apply to “all rational beings without distinction” and without regard for the “accidental circumstances” in which these beings are placed.^{xix} This facet of morality is particularly important to Rawls. He argues that the original position is constructed so that “irrelevant” or “arbitrary” factors do not influence the parties' decisions regarding the principles of justice.^{xx} Morally neutral factors such as “natural fortune” and “social circumstances” are purposely expunged from the conditions under which the deliberations are made.^{xxi} Rawls' deliberately broad definition of the individuals in the original position is therefore perfectly in accord with Kant's argument that since moral laws ought to apply to every “rational creature,” they must be formulated according to the “general concept of a rational being.”^{xxii}

The purpose of Rawls' hypothetical original position seems to be to find a way to make human behavior conform to Kant's moral theory without having to conform human nature and impulses to the duty-embracing individual found in Kant. Because Rawls' theory addresses political, rather than purely moral, concerns, his argument must stay as close as possible to what men *would* do, rather than what they *ought* to do. His attempt to do so by preserving the nonmoral assumption of rationally self-interested individuals, by placing them in circumstances that essentially negate the meaning of the word “interest,”

is ambitious, but unfortunately hindered by the contradictory purposes at work in his argument. .

Evaluating the Original Position

One of the most unique and problematic aspects of Rawls' theory of justice is his attempt to preserve the element of self-interest while simultaneously establishing principles that reflect a Kantian sense of morality. Before examining how these approaches are combined, Rawls' moral foundations must be scrutinized. I will argue that Rawls' original position fails because the abstract and contextless individuals in the original position are drawn too broadly to be of practical political use (since the conflicting interests they purport to represent are unrealistic) as well as too narrowly drawn to make a good model for morality (since, as Rawls emphasizes, morality must not take into account "arbitrary" differences). I will also point out that Rawls' original position fails not because it incorrectly interprets Kant's moral foundations, but because by making Kant's premises concrete, he makes its flaws more apparent.

Rawls appeals to commonly-held ideas such as the "inviolability" of individual persons in the face of societal interests and equal liberty much in the same way that Nozick does: neither attempt to erect a complex moral theory to establish these principles as anything other than generally-held beliefs.² Indeed, Rawls asserts that the original position can be justified with reference to how well it either matches or "extend[s]...in an acceptable way" our "considered convictions of justice."^{xxiii} The primary purpose of his "thought exercise," then, seems to express commonly-held moral sentiments in a more consistent manner, then apply them to a political structure:

There are questions which we feel sure must be answered in a certain way. ...These convictions are provisional fixed points which we presume any conception of justice must fit. But we have much less assurance as to what is the correct distribution of

² The closest either of them come to justifying their moral premises are their frequent references to Kantian doctrine. Rawls' methodology, although explicitly Kantian, seems to be justified with reference to general societal acceptance of Kantian principles, and not vice versa.

wealth and authority. ...We can check an interpretation of the initial situation [original position], then, by the capacity of its principles to accommodate our firmest convictions and to provide guidance where guidance is needed.^{xxiv}

Marcus G. Singer, in his article, "Justice, Theory, and a Theory of Justice," points out that while, early on, Rawls implies that he will attempt to prove that these original moral sentiments are "sound," but he never does this: "They are neither investigated nor argued for. They are just taken for granted, perhaps as obvious."^{xxv} It seems, therefore, that there is a strong element of question-begging in Rawls' argument. Thus, despite a far more rigorous attempt to articulate and systematize these moral principles, Rawls, like Nozick, ultimately relies on the fact that his ideas are uncontroversial and intuitively appealing.

The element of question-begging is amplified by the restrictions Rawls imposes on the principles that the initial situation parties may agree to. The "rules" for arriving at principles include: (1) that the principles be "general," that is, formulated without reference to particular individuals or "rigged definite descriptions,"^{xxvi} (2) that they be "universal in application," and therefore chosen "in view of the consequences of everyone's complying with them,"^{xxvii} (3) that they be publicly recognized^{xxviii}, (4) that they have the capacity to negotiate and order "conflicting claims" in society^{xxix}, and (5) that they are held as final, and not to be evaluated with reference to any "higher standards."^{xxx} These restrictions, Rawls notes, exclude the possibility of the parties electing "general egoism" as a principle of justice, since it does not provide a method of negotiating conflicting interests in society aside from everyone pursuing them on their own behalf.^{xxxi} Thus, before the parties have even begun to deliberate, they are barred from electing a society such as Nozick's, in which "interests" are not ordered by a centralized authority, but rather advanced through voluntary interactions. Rawls, for his part, has the audacity to point to such a conclusion as proof of "what we knew already, namely, that...it [egoism] is incompatible with what we intuitively regard as the moral point of view."^{xxxii} It is interesting to note the effect that Rawls' exclusion of "general egoism" has on his own use of the original position as a process for determining

principles of justice. In a society governed by egoistic relations, Rawls holds that interests would be negotiated through “force and cunning,”^{xxxiii} but this seems to be precisely the situation in the original position. Although the parties in the original position cannot be said to have specific interests, they are still mutually-disinterested egoists, and are aware of the fact that once the “veil of ignorance” lifts, they will still have interests to pursue and secure. Leonard Choptiany, in his critique of Rawls’ theory, points out that, as egoists behind the veil of ignorance, they will do their best not to lock themselves into a set of principles that may thwart their particular interests once they are delivered into a concrete society.^{xxxiv} It is therefore likely, argues Choptiany, that the original position parties will adopt a “combination strategy,” in which they propose a set of principles that the other parties will agree to in the original position, but which will allow the implementation of a “second strategy” once the veil of ignorance is lifted (one whose primary feature will be “the securing of the egoist’s advantage.”^{xxxv}) Rawls’ explicit assumption that those in the original position are moral persons who will follow the principles they set down does not resolve this dilemma without undermining his own theory, for, “If Rawls is prepared to allow moral sentiments in the contract situation, then the door is open to a utilitarian solution.”^{xxxvi}

How successfully does Rawls combine the elements of self-interest and moral constraints? In Rawls’ argument, two forces are at work. On the one hand, principles are adopted on the basis of their anticipated consequences and applications; on the other hand, the circumstances of adoption are structured so as to conform to a pre-conceived set of conceptions about morality. I would argue that Rawls’ failure to apply one approach exclusively causes his argument to falter in both the practical and moral realm.

Let us first examine how his dual strategy fares in his original position construct. When all is said and done, Rawls’ formulation of the original position is at once too broad (for practical purposes) and too narrow (for moral purposes). If his purpose is a practical one—and, indeed, his attempt to preserve a realistic concept of a self-interested, calculative individual would seem to suggest this—and the original position is supposed to help maximize individuals’ interests in the context of the human community, then his endeavor surely fails. The individuals he places in the original position are so broadly drawn as to reflect no *actual* individual interests; persons without specific knowledge of

either their own interests or their context simply do not exist in the real world. Thus, even if Rawls' original position parties arrive at a solution which maximizes *their* hypothetical interests from behind the veil of ignorance, any correlation to the maximization of actual concrete individuals' interests would be purely coincidental. We must also question why these hypothetical egoists would bind themselves to a set of principles of action which—though they serve their 'interests' from a perspectiveless, contextless standpoint—have no bearing on their ability to maximize their interests once they emerge from the initial situation. This assumption, explicitly adopted by Rawls for practical purposes, directly contradicts his insistence that these individuals are both rational and self-interested.

On the other hand, from a moral point of view, Rawls' original position seems arbitrarily and unnecessarily circumscribed. The original position parties are human, fully rational, and presumed to have interests requiring "social goods" to be fulfilled. Already, with this delimitation, Rawls has excluded young children, the mentally disabled, and all non-human entities from his scheme. Thus, his goal to exclude factors considered "arbitrary from a moral point of view"^{xxxvii} has not been achieved. This is where Nozick's grapplings with the idea of a rights-holding being is particularly insightful. What, we might ask, is morally significant about the faculty of reason? If an individual is born without this capacity (either as human or non-human), is this distinction any less arbitrary than the difference between an individual born with greater natural abilities than his neighbor? It is also interesting to note, as Anthony de Jasay does, that Rawls' assumption that the parties in the original position would almost certainly eschew the option of *not* coming to an agreement on principles seems to itself be an arbitrary one.^{xxxviii} Even if, as Rawls argues, remaining in the State of Nature would result in constant battles of "force and cunning" among unrestrained egoists,^{xxxix} Jasay challenges whether those in the original position (who prefer more primary goods to fewer) would have a natural preference for the State and therefore an agreement on principles:

The comparison of two bundles of primary goods...requires indexing, and the weights adopted for the index (for instance, the

relative valuation of time off against real income), cannot help but reflect a logically prior preference for a type of society. In other words, people in the original position cannot say that the bundle of primary goods available in the state of nature (containing, for instance, much leisure) is smaller than that available under the state (containing, for instance, many tangible consumption goods) unless they already know that they prefer to live in civil society. Comparison of the state-of-nature bundle and the state bundle presupposes the very preference which it is employed and required to explain.^{xi}

Another unfortunate result of Rawls' attempt to incorporate two highly divergent methods into his theory is that it precludes the possibility of reaching a "final conclusion" concerning morality. Within the context of the hypothetical initial situation, Rawls does stipulate that the principles arrived at in the original position are to be regarded as final, with no need to be justified with reference to any other principles. However, Rawls' *overall* moral theory states that the principles to come out of the original position are not justified merely with reference to the process; rather, they must be verified against our "considered convictions of justice," which, after all, informed the structure of the process in the first place.^{xii} Ultimately, neither the process (the original position) nor our intuitive moral sentiments take precedence in Rawls' argument, which opens up the possibility of an endless back-and-forth between the two. The most concrete rule Rawls can offer us for his theory is that sometimes our moral sentiments will be "in doubt" or "given with hesitation," and that in such cases the original position can help to "remove our doubts" by offering solutions we can "affirm on reflection."^{xiii} Rawls likens his theory to the invention of formal grammar after the development of speech: although we have an intuitive sense of "grammaticalness," we should "characterize the ability to recognize well-formed sentences by formulating clearly expressed principles which make the same discriminations as a native speaker."^{xiiii} This analogy, however, seems to fly in the face of the necessary "finality" of the principles as well as Rawls' explicitly anti-Utilitarian stance. The "grammar" Rawls wishes to develop would—unlike actual grammar—be

justified in itself, and not with reference to external standards, such as usefulness or efficiency.

While it is true that Rawls' theory is not meant to advance a personal moral theory (that is, one that dictates how *individuals* ought to act), but rather a theory of political ethics (justice) which deals with the "virtue of social institutions,"^{xliiv} it is obvious that he takes a clear moral stance. His rejection of Utilitarianism, for example, indicates an obvious position on the idea of "moral" social interaction, independent of the consensus of the general population.

Finally, we should note that his translation of Kantian morality into the original position cannot be dismissed as merely a sloppy attempt to concretize Kant. The two major dilemmas of the original position—namely, the conflict between the egoistic nature of the participants and the moral principles that are supposed to emerge, and the paradoxical appeals to both consequentialism and deontic norms—are present, to a degree, in Kant's theory as well. Kant attempts to break any sort of connection between morality and self-interest by specifying that only actions done from duty (rather than self-interest or a combination of these two motives) have moral worth. When we attempt to apply this idea consistently, however, we are confronted with the dilemma of either accepting an infinite regression of duties, or the incorporation of a selfish motivation to accept duty as a principle for action. Why does person *X* act from duty? Is it because it is his duty to act from duty, or because he embraces the concept of duty to advance his own spiritual interests (that is, to advance his *interest* in being a moral person)? The first option leads us into a series of infinite duties to do one's duty. The second inevitably suggests that *X* is doing his duty because he sees some selfish worth in embracing the concept of duty.³ The second problem we identified in the original position is also apparent in Kantian moral theory. Kant states that his morals are supposed to be justified without reference to their consequences. However, his categorical imperative (to act only according to a principle one could wish to be a universal law) derives its justification

³ Max Stirner levels a similar critique at the idea of perfect altruism/unselfishness: "Those who exhort men to 'unselfishness' think they are saying an uncommon deal. What do they understand by it? Probably something like what they understand by 'self-renunciation.' But who is this self that is to be renounced and to have no benefit? It seems that you yourself are supposed to be it. And for whose benefit is unselfish self-renunciation recommended to you? And, for *your* benefit and behoof, only that through unselfishness

from the avoidance of contradiction (thus, the rational is equated with the good.) There is, therefore, a consequentialist justification for Kant's categorical imperative: namely, the arrival at a non-contradictory state of affairs.

It is clear that these flaws exist in both Kant's theory and Rawls' interpretation of this theory; however, the more concrete and explicit nature of Rawls' original position makes them far more apparent than in their Kantian incarnation.

Nozick and Morality

Like Rawls, Nozick incorporates Kantian moral theory into his argument. The most prominent example of this is his use of Kant's practical imperative: "So act as to treat humanity...in every case as an end withal, never as means only."^{xlv} The specific set of rights and constraints that Nozick outlines reflect his attempt to integrate the idea of "the inviolability of other persons"^{xlvi} with that of the individual's making his life meaningful by directing it "in accordance with some overall plan..."^{xlvii} Nozick rejects Utilitarianism because, as Rawls points out in *A Theory of Justice*, it "does not take seriously the distinction between persons."^{xlviii} In order to illustrate this point, Nozick challenges the idea that sacrificing one or several individuals for the benefit of the "overall social good"^{xlix} actually translates to anything in concrete reality. He observes that "there is no social entity with a good....[t]here are only individual people, different individual people, with their own individual lives."^{li} Nozick concludes that when it is alleged that certain individuals must be sacrificed to the "overall social good," what is actually taking place is the sacrifice of certain individuals for the benefit of certain other individuals.^{li}

Because much of his argument takes place in the realm of the "is" rather than the "ought"—and the few principles he does incorporate are constantly compromised in light of the circumstances under which they occur—it would be easy to dismiss Nozick as merely a Kantian unable to follow his premises through to their logical conclusions. Certain passages in *Anarchy, State, and Utopia* do seem to affirm this notion. For

you are procuring for you 'true benefit.' ... You are to benefit *yourself*, and yet you are not to seek your benefit." (From *The Ego and His Own*, pp. 77).

example: Despite Nozick's adherence to the idea of treating people never as means alone, in discussing an individual's right to be compensated for a rights-violation, he stipulates that if "reasonable precautions" are not taken by the victim (an instance of "non-coping"^{lii}), then compensation is not due to the same degree.^{liii} As James Dale Davidson points out in a critique of Nozick's work, this caveat seems to require that the victim "cease to define his own ends and become a means for the transgressor..."^{liv}, thus violating Kant's practical imperative. In other instances, Nozick allows side-constraints on action to be overridden if the circumstances warrant it. For instance, while individuals are prohibited from aggressing against other individuals, they may do so if the other person represents a threat—even an "innocent threat" who harbors no malicious intent.^{lv} This allowance, of course, directly countermands Kant's insistence that moral principles be followed without regard for the particular circumstances in question, or the interests of the individual.

Despite these shortcomings, Nozick's argument balances such instances of compromised Kantianism with sharp insights into the dilemmas of Kantian theory. In attempting to articulate a reason for why we should grant humans (rather than, say, animals or plants) rights, he observes that many of the traditional virtues defining a rights-holding entity—sentience, self-consciousness, rationality, free will, moral autonomy, etc.—seem "insufficient to forge the requisite connection" to imposing restraints on our behavior.^{lvi} To illustrate his point, Nozick observes that simply possessing an I.Q. above a certain threshold does not strike most people as morally significant, and that such a criterion for moral treatment could indeed backfire on human beings. He asks: "Would beings even more intelligent than we have the right not to limit themselves with regard to us?"^{lvii} That is, is there a universal moral hierarchy dictating how entities may be treated?^{lviii}

Many of Nozick's attempts to integrate moral theory into his argument follow this pattern of apparently falling short of correct application, and then demonstrating the principle's own internal incoherencies. In applying the Kantian doctrine no one should be treated merely as means, but as an end as well, Nozick is quick to point out that constraining one's behavior so as to "use" a person for no end other than those which that person has consciously elected would be impossible.^{lix} It is therefore "sufficient,"

according to Nozick, that both parties have voluntarily entered into an exchange, and go through with it, despite the potential motives the opposite party may harbor or the uses they may put his gains to.^{lx} Nozick's solution does not align particularly well with Kantian doctrine. His stipulation that each party voluntarily make the exchange with the other has no effect whatsoever on how that person is being regarded by the opposite party. Even if person *A* has entered into the exchange with no qualms about how the profit (material or psychic) person *B* makes gains from him will be used, this says nothing about how *B* views *A*'s part in the exchange. Despite *A*'s demeanor in the situation, *B* may still regard *A* entirely as a means to *B*'s own ends. Nozick's solution rests on person *A*'s evaluation of the exchange (i.e., going through with it despite the possibility of his being a means to something he does not approve of), Kant's practical imperative is concerned with *B*'s actual intentions toward *A*. In spite of his inability to resolve this conundrum, Nozick's treatment of the issue draws attention to the extreme difficulty of trying to consistently apply Kant's imperative. Nozick furnishes the example of an individual deriving pleasure from watching another attractive person walk by as a situation in which it would be difficult to avoid using that other person solely as means.^{lxi}

Interestingly enough, the moral issues that Nozick wrestles with reflect his fundamental acceptance of Kantian moral theory, and, by extension, Rawls' original position. We see this most clearly in Nozick's approach to values and valuing. One of the most significant implications of Kant's theory of morality is its strict division between value and valuer. For example, while a moral duty (such as the duty to preserve one's life) may incidentally correspond with a man's natural inclination, it does not derive its moral worth from fulfilling that inclination. In fact, it is quite the opposite: the less "direct inclination" a man has for an act of duty, the more moral worth is attached to his performing the act.^{lxii} Values are determined externally to the interests of the individual in question. Thus, when Nozick asks whether a species of greater intelligence would have the "right" to treat humans as animals, he seems to be removing the question of values from a delimited sphere of valuation—for example, values as determined by human interests—and attempting to define them without reference to a specific being with specific interests. In a similar vein, Nozick asks whether a convicted criminal who

knows himself to be innocent should try to flee his punishment.^{lxiii} It is clear that here Nozick is trying to arrive at an “ought” fitted to both the criminal—who has an interest in avoiding unjust punishment—and the authorities—who have an interest in punishing those they believe to be guilty.

Nozick’s moral theory is essential to the success of his political theory insofar as it must answer perhaps the most frequently employed anarchist criticism of the minimal State—namely, that establishing the State in order to prevent violations of rights is contradictory, since the State cannot help but incur rights-violations of its own.^{lxiv} His partial use of Kantian principles of action, however, is not particularly persuasive to individualist anarchists who embrace a naturalistic—rather than metaphysical—theory of morality. One of Rothbard’s main criticisms of Nozick’s political theory is that “as a Kantian intuitionist, he [Nozick] *has* no theory of rights. Rights are simply emotionally intuited, with no groundwork in natural law...”^{lxv} In order to fairly determine how the inconsistencies in Nozick’s moral tenets affect the overall merit of his argument, the naturalistic theory of rights adhered to by many of his anarchist critics must be scrutinized as well.

Naturalistic Theories of Morality

Naturalistic theories of political ethics (such as those advanced by Murray Rothbard) attempt to sidestep the problem of the seeming arbitrariness of simply asserting moral principles such as “don’t aggress against others,” or “respect property rights.” They recognize that political theorists such as Rawls and Nozick must ultimately admit that if someone does not agree with their moral premises—for which they have no empirical “proof”—then the remainder of their theory loses its power of persuasion. Many proponents of individualist anarchism and minimal government adhere to naturalistic theories in which “life” is the standard of good, and “morality” is defined as a simply a set of values to aid man in achieving and maintaining that good (namely, his life). At first glance, this formulation seems simple enough: that which furthers life is good, and that which hinders or destroys it is bad. However, difficulties arise when we are forced to posit a narrower and more concrete definition of “life,” and when

proponents of naturalist ethics attempt to avoid simply equating “good” with “life-sustaining” (which would seem to make morality redundant). In order to evaluate naturalistic ethics (and specifically, those which use the “life as the standard of value” formulation), and to weigh the naturalists’ claim that they succeed in providing an “objective” theory of morality/political ethics while Nozick and Rawls remain mired in non-falsifiable imperatives, we must examine the coherency (and empirical validity) of the major naturalistic contentions. Are they able to escape the “naturalistic fallacy”⁴ (of redundancy) and simultaneously avoid sliding into the realm of non-falsifiable metaphysical claims? Do the values they propose escape the original position (and Kantian) trend of divorcing value from valuer? And, finally, even if the idea of “life as the standard of value” is stripped down to its most individualistic, minimal form, can it be employed in a coherent or realistic fashion? Whether a naturalistic political ethics can successfully address these issues will undoubtedly affect our final evaluation of Nozick’s morality.

Defining “Life”

G.E. Moore, in *Principia Ethica*, makes the observation that naturalistic theories of ethics inevitably run into the dilemma of removing themselves from the realm of morality entirely. Such theories, he explains, attempt to define the good according to some particular property, such as “pleasure” or “utility,” and in doing so, they make the assertion that a thing which possesses that particular property is “good.” In the case of the life-as-value naturalistic ethics, the assertion would be, “any action which is life-sustaining is good.” While this avoids the problem of non-falsifiability often encountered in metaphysical theories of the good, it simultaneously strips the word “good” of any substantive meaning. For in examining the assertion, “that which possesses this property is good,” we are forced to translate it as either “ ‘what possesses this property, possesses this property’ or ‘the word ‘good’ denotes that a thing possesses this property.’ ”^{lxvi} And yet, as Moore points out, neither of these formulations offer much in the way of a significant ethical proposition: one simply states what is, and the other simply uses

⁴ See G.E. Moore’s *Principia Ethica*, pp. 38.

“good” as a synonym for some other property. Such a formulation offers little in the way of moral compulsion. That is, it does not bridge the famous is-ought gap first articulated by David Hume.⁵ It is easy to see, then, why a naturalistic ethics using “life” as a “standard of goodness” cannot use “life” in the sense of “life-sustaining.” If that were the case, then the word “good” would become redundant; naturalistic theorists would find themselves urging people to take “life-sustaining” actions for no morally compelling reasons. Proponents of a “life as standard of value” morality therefore attempt to side-step this problem by asserting that the “life” in question is a *particular kind of life*: one that requires specific principles of action to achieve and maintain it. This assertion is made in two stages: first, man’s “nature” is defined, and second, the principles which allow man to live as is proper to his nature are outlined.

Upon hearing the phrase “human nature,” many people today react skeptically, especially given the apparent diversity of human characteristic and behavior in the world today. Rothbard attempts to dispel this skepticism by arguing that observing the “nature” of other entities in the world—plants, animals, molecules, etc.—is not a problematic task, and that “man’s nature” can just as easily be defined.^{lxvii} A “natural-law ethics,” therefore, “states that goodness or badness can be determined by what fulfills or thwarts what is best for man’s nature.”^{lxviii} Rothbard advances the idea that man’s nature can be perceived by imagining him in a “Crusoe situation,” in which he is forced to use his capacities for “observation, abstraction, [and] thought” (namely, “reason”) to survive.^{lxix} Man’s nature, then, is his use of reason in choosing his goals (e.g., food and shelter) and using his labor in conjunction with natural resources to attain them.^{lxx} Political ethics, he argues, must therefore reflect these facts by preserving self-ownership—and, by extension, ownership of the natural resources one adds one’s labor to—through prohibitions against aggressing against another individual and damaging or stealing another’s property.^{lxxi} The “good,” according to Rothbard, is that which advances man’s life by allowing and encouraging him to employ his reason in pursuit of his goals.

⁵ Hume explains the move philosophers attempt to make from the realm of “is” (i.e., the perceivable, verifiable realm) to the realm of the “ought” (which does not seem to correspond to any concrete referent): “This change is imperceptible; but is, however, of the last consequence. For as this *ought*, or *ought not*, expresses some new relation or affirmation, ‘tis necessary that it shou’d be observe’d and explain’d; and at the same time that a reason should be given, for what seems altogether inconceivable, how this new relation

Similar formulations are put forth by other proponents of a naturalistic ethics. Tibor Machan argues that, "By nature we live a most fully human life by being rational," and that if we refuse to act in this manner, we "also reject the requirements of human life...[and therefore] fail...in the commitment we make when we choose to live, namely, to live as fully as is possible to us."^{lxxii} Douglas B. Rasmussen, in his article, "A Groundwork For Rights: Man's Natural End," maintains that an entity must act in accord with its particular nature, or it cannot be said to "truly" live. How is "life" as a human achieved? Rasmussen answers that an individual must act according to the principles of "rationality, productivity, pride and benevolence," in order to be considered as living a "successful human life."^{lxxiii} In *The Market for Liberty*, the Tannehills emphasize that "life" is not "merely man's physical existence but all aspects of his life as a sensing, thinking, being."^{lxxiv} Thus, among proponents of the "life-as-standard-of-value" morality, the word "life" denotes "life in accord with man's nature," which boils down to the use of rationality to attain ends through productivity.

The most obvious question that must be put to this theory is, how can something act *against* its nature? If we determine an entity's nature by observation, how can any act we observe the entity in question to be doing be "unnatural"? Here it is useful to recall Hume's criticism of theories which attach goodness to that which is natural and badness to that which is unnatural. Hume points out that if we interpret "natural" as meaning *not* supernatural, then good and evil seem equally "natural."^{lxxv} Similarly, if "natural" is taken to mean "not artificial"—as in, not a product of men's designs—then good and evil fall equally into these two categories.^{lxxvi} Finally, if "natural" is supposed to mean "opposed to the unusual," then we run into problems of objectivity, since we can only determine the "usual" and "unusual" according to our limited scope of observations, which may or may not reveal facts representative of the universe as a whole.^{lxxvii} This last definition would also force us to condemn "unusual" behavior such as artistic genius or extreme heroism as immoral.^{lxxviii} To define certain possibilities of human behavior as "in accord with human nature" and others as "opposed to human nature" therefore seems to amount to the advancement of non-falsifiable claims.

can be a deduction from others, which are entirely different from it." (From *Treatise of Human Nature*, pp. 469.)

Proponents of natural law do, of course, recognize and address this dilemma. When confronted with the fact that many people do not act according to the principles of “human nature,” Rasmussen responds with the assertion that these principles are “no less obligatory” simply because “immediate and devastating consequences” do not follow their violation.^{lxxix} Even if the consequences are not “as immediate or ostensible” as those which follow from the violation of other laws, Rasmussen maintains that they are no “less necessary for a good human life.”^{lxxx} The Tannehills advance a similar claim: “No matter how cleverly a man schemes, he will suffer if he insists on acting in a manner which contradicts the nature of human existence. The consequences may not be immediate, and they may not be readily apparent, but they are inescapable.”^{lxxxi} Rasmussen concludes,

A human can, of course, act in a manner inconsistent with the standards set by his nature and not be literally dead, but such ‘non-death’ cannot be considered life or, at least, successful human life. To ignore principles that human life requires and to attempt to live without regard to them in any manner one might choose is to opt for an existence as a metaphysical misfit, living by sheer luck and/or the moral behavior of someone else.^{lxxxii}

It would appear that when pushed, proponents of a naturalistic ethic revert to statements that simply cannot be empirically verified. How can we judge whether there are “consequences” for violating human nature if these consequences are asserted to exist regardless of whether we can perceive them or not? What, precisely, does it mean to be a “metaphysical misfit,” and why should anyone care whether he is classified as such? Rasmussen’s use of the phrase “successful human life” is equally mystifying. Should “success” be judged by any other standard than that individual’s fulfillment or nonfulfillment of his particular needs and wants? To answer in the positive would seem to push naturalists into the realm they wish to avoid: that of non-falsifiable, intuitively-grasped moral convictions. In sum, then, theorists such Rasmussen and Rothbard appear to rely on the power of definitional fiat for terms such as “natural” and “successful human life” in order to justify their theories.

A Naturalistic Original Position?

We must now turn to the question of whether proponents of naturalistic political ethics escape the value-valuer dichotomy that renders Kantian moral theory difficult to objectively “prove.” Rothbard claims that the principles of action proper to “human nature”—primarily, reason and productivity—are derived from the “fundamental truths of the nature of man *vis-à-vis* the nature of the world into which he is born, as well as the world of other men.”^{lxxxiii} These fundamental truths can be discovered, he argues, by examining the conditions of survival in a “Crusoe scenario.”^{lxxxiv} The Crusoe scenario imagines a man alone on an island who must survive by applying his reason and his labor to the natural resources around him. Interactions between men can also be derived from the Crusoe scenario, if we add one more man to the island. In this situation, Rothbard argues, both men are able to survive and flourish by respecting each others’ self-ownership and ownership in the natural resources they first apply their labor to.^{lxxxv} Rothbard’s Crusoe scenario is strikingly reminiscent of Rawls’ original position: both situations purport to illustrate the “fundamental” truths of the human condition. While Rothbard’s situation does differ from Rawls’ in that it could potentially exist outside our imaginations (unlike Rawls’ original position), it does not perfectly align with the conditions most humans currently inhabit.⁶ If Rothbard’s principles are supposed to be equally applicable to all humans (which he insists they must be), then any delimitation concerning the representative individual’s capacities or context would damage his theory. For example, if an individual is a despot who lives off the spoils of his subjects’ taxed wealth, then it is quite possible for him to live comfortably by applying aggression and threats rather than reason and productivity. Conversely, if an individual is under the threat of imminent starvation, it would seem far more “life-affirming” for him to aggress against another’s property and steal food for himself than to respect property rights and starve. Rothbard’s implicit “original position” is one in which individuals are rational

⁶ For example, individuals in Rothbard’s “Crusoe scenario” are presumed to have access to sufficient unowned resources to provide for their survival needs, while most of the natural materials and land today are under the control of either private individuals or States.

and able-bodied, and nothing in their circumstances prevents them from applying reason and labor in order to acquire needed commodities.

The dependence of theories such as Rothbard's on an "original position" formulation becomes particularly apparent when "emergency" or "lifeboat" situations are examined. Situations such as these are characterized by individuals' inability to apply the principles of "human nature" and at the same time manage to preserve their well-being. Eric Mack, who advances an ethical theory similar to Rothbard's, offers the example of two men adrift at sea, both attempting to cling to a plank only able to support one of them.^{lxxxvi} We can also imagine similar situations, such as two men in lifeboat fighting over a single ration of food and water. It would appear that cases such as these contradict the claim that using rationality and productivity—and, as a consequence, respecting the self-ownership and property rights of others—are necessary to man living a "successful human life." Indeed, the individual refusing to aggress against the other in these emergency situations turns out to be the least successful at preserving his life. Proponents of a natural-law ethics offer several responses to the "lifeboat scenario" criticism. Eric Mack maintains the "individualist" portion of the theory—which demands that one advance one's own interests—but discards the portion that compels a person to respect the person and property of others. He argues that "rights appear only when reasonably sane societal conditions prevail, and not in emergency and purely chaotic situations..."^{lxxxvii}

Theorists such as Rothbard and Machan take a different approach. Both argue that because ethical principles are developed in light of the "normal" set of circumstances, a situation as unusual as the emergency scenario is not "a valid test" for their theories.^{lxxxviii} Rothbard asserts that an ethical theory should be based on "the way life usually is" rather than on "rare and abnormal situations."^{lxxxix} Machan similarly demands, "Are the principles or virtues that are to guide ordinary human conduct and relationships identical to those that might help with the bizarre?"^{xc} This line of reasoning, however, is shaky as well as damaging to their overall theory of morality. Let us first recall Hume's caution that the standard for what is "normal" is not an objective or absolute one, but rather a mutable one, subject to the scope of our perception and

experiences. Moreover, Rothbard himself emphasizes the need for principles to be applicable to *any* situation:

A vital point: if we are trying to set up an ethic for man...then to be a valid ethic the theory must hold true for all men, whatever their location in time or place. This is one of the notable attributes of natural law—its applicability to all men, regardless of time or place.^{xci}

It would seem, therefore, that dismissing such “crisis” situations as not relevant to the development of a moral theory negates any attempt to formulate universal (human) principles. A slightly more sophisticated, but equally flawed defense is proffered as well. Both Rothbard and Machan attempt to sidestep the problem altogether by claiming that their theory deals with ethics in the *political realm*, and not the *personal morality* of individuals. Rothbard argues that in developing a “political ethic,” he is not concerned with “*personal* moral principles,” and that his theory has nothing to say about the morality or immorality of the possible actions one might take in a “crisis situation.”^{xcii} Machan, in a similar vein, argues that a theory of natural rights and natural law is “supposed to guide the formation of law and government, not personal conduct.”^{xciii} Therefore, because “natural law” principles are formulated with regard to “the ethics of public policy,” they apply only to situations where “public life is possible.”^{xciv} This sort of *ad hoc* dichotomizing between the realm of politics and morality robs both theories of any sort of argumentative clout—not to mention their *raison d’être*. Both Machan and Rothbard lay the groundwork for their theory of natural law by asserting that man’s nature can be objectively determined, and that the natural-law principles he should adhere to are those which best advance his interests (defined most fundamentally as the preservation of his life). Early on in *The Ethics of Liberty*, Rothbard states with confidence that “natural law provides man with a ‘science of happiness,’ with the paths which will lead to his real happiness.”^{xcv} We will also recall his comment that “goodness” and “badness”—and, by extension, moral and immoral behavior—are defined by what “fulfills or thwarts what is best for man’s nature.”^{xcvi} Machan insists that the human political community must reflect the “basic facts of human morality” so that

it can “be conducive to human moral goodness and thus be characterized as just.”^{xcvii} Rothbard and Machan’s attempt to divorce political ethics from individual morality essentially cripples their own argument, for if they have nothing to say about what a person *ought* to do, then there is little room for them to advocate their particular political beliefs the foundation of which is a natural-law theory. Their last-minute escape from the realm of morality leaves us with the conclusion that while natural-law can dictate what kinds of principles society ought to *make* into law, it says nothing about what kinds of laws we ought to actually *follow* as individuals. And since specific individuals must decide to implement these laws in the first place, it would seem that, if Rothbard and Machan have nothing to say about what these individuals *should* do, then we are left with a system of laws based on a naturalistic ethical theory and no particular reason to *implement* them.

Salvaging “Life” as a Standard of Value

In attempting to employ the word “life” in a morally-significant way, natural law theorists inevitably run into the problem of trying to prove their assertions with reference to perceivable reality (rather than, for example, the metaphysical realm.) Might it be possible, however, to simply attribute moral worth to life in the minimal sense of “life-sustaining”? Several difficulties would have to be overcome to avoid the pitfalls of either non-falsifiability or reversion to the “naturalistic fallacy.” First, we would have to establish that the term “life-sustaining” could be employed in a logically coherent manner. Second, we must be able to establish a connection between the moral and the life-sustaining; that is, we would have to provide a reason for why people ought to do what is life-sustaining. Third, we must have to be able to show that this kind of morality could be practiced consistently in the real world.

The Coherency of a “Life-Sustaining” Morality

In examining the first criterion, we must begin by taking note of the fact that one cannot establish “life” in the abstract as the absolute “good.” Because individual lives

are finite, to establish “prolonging life indefinitely” as the standard of “good,” or moral value, would be absurd, since the chances of anyone living up to such a morality would be so small as to near zero. Patrick O’Neil points this out in his article, “Ayn Rand and the Is-Ought Problem”: “if unending life is the goal, we are certain to fall so infinitely short of the mark as to render the distinction between instant death and death after the interval of centuries meaningless.”^{xcviii} Would it be possible, then, to simply establish the standard of morality as extending life as long as possible? Aside from the obvious complications that would arise when evaluating a person’s actions as moral or immoral,⁷ it is also difficult to establish why a greater, rather than lesser amount of time alive, has moral worth. O’Neil observes that defenders of this position would have to establish why the “loss of life at time $t + x$ is to be preferred (automatically) to the loss of life at time $t + (x - 1)$ or at time $t + (x - 1,000)$ or at any other time.”^{xcix} We might also take issue with the fact that such a standard of morality would require that we attribute worth to life solely on the basis of its temporal span; it seems arbitrary to exclude the *quality* of life from evaluation. This last point gives us some insight into why “life-as-standard-of-value” theorists try to incorporate a more complex definition of life into their morality, despite the added complication such an expansion brings. Thus, we must conclude that while a “live as long as you can” ethic would at least be logically feasible (as compared to a “you must live indefinitely to be moral” ethic), there does not seem to be any moral relevance to its imperative.

The Moral Relevance of Life

The second challenge—objectively establishing that people *ought* to accept a “life-sustaining” morality—has been addressed by several naturalistic theorists. Rasmussen argues that because an individual must be alive to choose ends and take actions, anyone who makes choices and values ends (and this covers most people) must also implicitly value life, since these choices and values *presume* life in the first place. He states: “Insofar as one chooses, regardless of the choice (even if the choice is not to

⁷ After all, certain individuals might have a genetic predisposition towards longer or shorter lifespans, and it might be difficult to perceive these predispositions for the purposes of judgment.

choose), one must choose (value) man's life qua man. It makes no sense to value some Y without also valuing that which makes the valuing of Y possible."^c A quick analysis of this argument reveals its flaws. Starting from the premise that life is a necessary means for other ends (pleasure, happiness, etc.), it does not necessarily follow that life is the "ultimate end." While it is true that existence (being alive) is an inescapable means to these ends, we may easily uncover other examples of "inescapable means" that are obviously not ultimate ends themselves. For example, to purchase a desired commodity in modern civilization, money is required; without it, no goods can be purchased. And yet it is quite obvious that the money itself is not the "ultimate end," since without the existence of the desired commodities, acquiring money would hold no value.⁸ We can also observe that it is impossible to paint an oil painting without employing oil paints; however, it is obvious that acquiring the oil paints is not the "ultimate end" of painting such a picture. This fact is supported by David Friedman's observation that people's actions do not indicate that they regard life as "infinitely valuable."^{ci} People's day-to-day choices show that they frequently "make trade-offs between life and quite minor values," such as the desire to smoke and eat unhealthy foods.^{cii} Furthermore, Friedman points out that any attempt to place "ultimate value" on life would be impossible, since actions as mundane as crossing the street, driving a car, or spending money on goods other than medical insurance must necessarily risk one's survival in the pursuit of "lesser" goods.^{ciii} In examining Rasmussen's charge that it "makes no sense" to value goods X, Y, and Z without also valuing that which makes them possible (namely, life), we must challenge the relevance of the fact that such a valuation would make no sense. The fact that a person does not properly weigh a set of values does not have any direct effect on the morality or immorality of the valuation. O'Neil observes that Rasmussen's "hedged phraseology" belies his unwillingness to address the issue directly. In examining Rasmussen's phrase that such a valuation "makes no sense," O'Neil asks, "Why not use the stronger 'is illogical'?" But were 'is illogical' the words used, we would be left with the perplexing question: If such a valuation were truly illogical, how indeed could it be made?"^{civ}

⁸ It is true that goods and services can be acquired through other means, such as payment in kind; however, the point applies equally to these circumstances. It remains true that the thing being bartered away is *not* an ultimate end, though it is a necessary means.

Rothbard makes a similar attempt to justify his use of a “life as standard of value” morality. He argues that the principle that life is a value is “axiomatic, since any person who is alive enough to deny that it is a value is contradicting his own preference to stay alive.”^{cv} Rothbard asserts that “if he were *really* opposed to life, he would have no business in such a discussion, indeed he would have no business continuing to be alive.”^{cvi} David Osterfeld puts Rothbard’s argument in the form of a syllogism that clarifies its relevance to the validity of Rothbard’s natural-law theory:

1. Self-ownership and property ownership are necessary means to sustain life.
2. Everyone values life more highly than death.
3. Hence, everyone ought to adopt the principles of self-ownership and property ownership.^{cvi}

Osterfeld argues that it can be proven that everyone values life more highly than death, since “anyone can end his life at any time he chooses,” and therefore all those currently existing are expressing a preference for life over death.^{cvi} Given Osterfeld’s agreement with Rothbard, his syllogistic expression of Rothbard’s theory is curious, for the syllogism swiftly and efficiently reveals the flaws in Rothbard’s reasoning. Upon examining it, our attention is immediately directed to a seemingly contradictory state of affairs. It is obvious that since Rothbard is taking the time to present and argue for his view of politics, it is not currently the case that the principles of self-ownership and property ownership (as he defines them) are satisfactorily being applied in most currently-existing states. However, the syllogism’s major premise states that property ownership and self-ownership are *necessary* to sustain life. And yet, the individuals living in states that do not currently adhere to principles of self-ownership and ownership of property are clearly alive. The very individuals Rothbard seems to be addressing invalidate his own natural-law formulation concerning what is necessary to life and what is not! How can this be?

In order to resolve this paradox, we must examine Osterfeld’s use of the word “life” in the syllogism and subject it to the principles of Austrian economic theory to which both he and Rothbard adhere. Since it is individuals who are demonstrating their

preference for “life,” we must examine the term in light of how *they* would employ it. The term cannot refer to “life in general”—including plant, animal, *and* human life—since we are dealing with a choice within their capacities, and it is obvious that no one person has the power to preserve or destroy “life in general.” Is the value they are expressing “human life”—the greater quantity, the better? This, too, is obviously out of each individual’s range of feasible action. Upon reflection, we must conclude that the preference each currently-existing individual is expressing is that, at the moment of observation, he values the extension of *his* life. If we are proceeding strictly according to “demonstrated preferences,” (which seems to be Osterfeld’s intent, given his comment that a person’s values “are made known to himself and others through his actual choices”^{cix}) then we cannot attribute any other act of valuation to the living individual. We cannot assume that he prefers the general flourishing of human life, or even that he prefers a particular mode of living. What Osterfeld has failed to take into consideration is the general truth of modern economics, expressed succinctly by Rothbard: “[A]cting man does not evaluate the goods open to him by abstract classes, but in terms of the specific units available.”^{cix} Osterfeld’s assertion that people obviously value “life” has little meaning, in the absence of a clear delimitation of the “good” that each person is preferring and in what context he is preferring it. It is interesting to note that Rothbard, in his defense of anarchism, makes a parallel argument in response to the minarchist charge that the State (with its law-enforcing power) is a prerequisite to the market:

It was the fallacy of the classical economists to consider goods and services in terms of large *classes*; instead, modern economics demonstrates that services must be considered in terms of *marginal units*. ...If we begin to treat whole classes instead of marginal units, we can discover a great myriad of necessary, indispensable goods and services all of which might be considered as ‘preconditions’ of market activity. Is not land room vital, or food for each participant, or clothing , or shelter?^{xi}

Ironically, what Osterfeld’s syllogism succeeds in doing is proving that the principles of self-ownership and property ownership are indeed *not* necessary to

sustaining life. If a single tyrant succeeds in killing everyone around him and looting their material goods—such that he is provided with enough goods to preserve his own life—has not life been “sustained”? Granted, in this rather drastic scenario, only one life has been “sustained,” but we must admit that it is a life nonetheless. Such a tyrant has clearly demonstrated his preference for life (rather than death), while blatantly flouting the principles Osterfeld maintains are “necessary” for life.

The failure of Osterfeld’s syllogism points to the fundamental dilemma encountered by any naturalistic moral theory that purports to reveal the principles of action necessary for the attainment of a “successful human life.” The crux of the naturalistic dilemma is explained by O’Neil. If “natural laws” *can* be violated by men, he observes, then they cannot be said to hold the status of “law,” and in order to introduce some element of compulsion (i.e., some compelling reason why men should act in accordance with them), an “ought” must be introduced. This, however, introduces the problem of justifying the “ought” and attempting to circumvent Hume’s is-ought gap. On the other hand, if the natural law in question *cannot* be violated, then no moral worth can be attributed to an action in conformity with it, since morality requires the presence of volition.^{cxii9}

The Practicability of a “Life-Sustaining” Morality

The final challenge that must be met with regard to the possibility of a “life-sustaining” morality is whether it could be practiced in the real life. The primary difficulty we run into here is the uncertainty of knowledge. As Ludwig von Mises observes in *Human Action*, “the uncertainty of the future is already implied in the very notion of action”; a being who had certain knowledge of the future would have no incentive to act, since no favorable changes could be made to his situation.^{cxiii} Even when man forms a plan of action, he cannot be sure of its outcome, nor even of the *probability* of a successful outcome, or the risk of a failure that incurs damages. Thus, in attempting to apply a “life-sustaining” morality, an individual would have to establish a seemingly-arbitrary threshold of acceptance risk and anticipated payoff. This, of course,

⁹ attempt to find Rothbard’s quote about the necessity of volition to morality. (power and market?)

would assume that the individual could estimate the probability of success and the risks associated with failure with some degree of accuracy. This also raises the question of how moral evaluations would have to be specifically tailored to each individual, since they would have to take into account men's differing capacities for rational thought. The difficulty of forming a moral judgment with regard to an action increases when one considers the need to determine how far ahead one must be able to perceive the consequences of one's actions. Even if an individual could accurately or semi-accurately predict the immediate consequences of his actions, in order to morally evaluate his action, a standard would have to be established stating how far in advance an action's life-affirming or life-destroying consequences would have to be estimated.

Liberty, Coercion, and Rights

Central to the idea of rights is the concept of coercion. Political theorists who advance a theory of rights often first establish a definition of coercion: this definition outlines a "moral space" for each individual that may not be infringed upon by others. It establishes which types of human interaction are *not* legitimate by virtue of depriving the individual of some measure of liberty. Political theorists, even those who fall within the same spectrum of political beliefs, often diverge sharply on the issue of coercion. Some, like F.A. Hayek, take a relatively broad stance on coercion, and allow it to include phenomena such as lying and "economic coercion." Others—especially those in the naturalist tradition, such as Rothbard and Rand—carefully circumscribe it to include *only* physical threats. The primary difficulty in defining coercion is that it is unclear which actions it should include, for in saying that an individual has been "coerced," we are attempting to find a middle ground between "voluntary" and "nonvoluntary" actions. As Hayek observes, the coerced individual—unless another is physically controlling his movements—does retain a choice in his actions, and thus can be said to act "voluntarily."^{cxiv} On the other hand, if we consider a "clear" case of coercion—for example, a man being forced to hand over his money at gunpoint—we are more inclined to label such an act as "involuntary." We want to say that the man being robbed did not really *want* to give his money to the robber, but that he was *coerced* into doing so by the

threat of physical violence.¹⁰ The concept of coercion implies that although the individual in question freely chose his actions, the nature of the choices he was presented with made his actions “involuntary” in some sense.

Among Libertarians, we can gather that Nozick’s concept of coercion lies somewhere in the middle of the spectrum, though the passages where he directly addresses the concept of coercion are fairly sparse. When examining the claim that many exchanges on the market are not “truly” voluntary because they are made by individuals who face a drastically narrowed range of choices, Nozick asserts that it is the nature of the coercing agent and his actions that determine whether coercion has taken place:

Whether a person’s actions are voluntary depends on what it is that limits his alternatives. If the facts of nature do so, the actions are voluntary. ...Other people’s actions place limits on one’s available opportunities. Whether this makes one’s resulting action non-voluntary depends upon whether these others had the right to act as they did.^{cxv}

Compared with other theorists, Nozick approaches the issue in reverse. Rather than determining which actions by other persons curtail a person’s legitimate liberty (i.e., are classified as “coercive”), and then building a theory of rights on that, Nozick first assumes certain rights to exist and defines coercion according to these. Applying his concept of coercion to the market, Nozick asks whether a person who is facing the option of either working or starving can be said to be “coerced” by the other members of society who do not provide him with a third option. Nozick maintains that the person in this scenario chooses to work “voluntarily” (rather than being “coerced” into it) if the other members of society have all “acted voluntarily and within their rights.”^{cxvi}

Nozick’s main objective in addressing the question of “voluntary” versus “nonvoluntary” actions is to respond to those who accuse the free market of allowing individuals to be coerced into working under conditions they do not choose. Because his concept of coercion is based on rights, he must respond to those who contend that

¹⁰ One must keep in mind, however, that given his choices between death and handing over his money, the individual might be said to prefer, i.e., *want*, to give over his money.

individuals have a right to things like equality of opportunity. In addressing this contention, Nozick points out that the enforcement of such rights requires a “substructure of things and materials and actions” and that others may be equally entitled to these goods.^{cxvii} Nozick therefore concludes that the rights advanced by those in favor of a socialist economy are invalid, since “No one has a right to something whose realization requires certain uses of things and activities that other people have rights and entitlements over.”^{cxviii} It is similar to the idea expressed by John Hospers in “What Libertarianism Is”: “It has become fashionable to claim virtually everything that one needs or desires as one’s *right*. ...But there is a gimmick attached to each of them: *At whose expense?*”^{cxix}

Certain problems arise when we analyze Nozick’s concept of coercion and rights. His attempt to work in reverse—first defining rights, and then building a concept of coercion on that definition—presents problems of justification. For most theorists, the concept of coercion serves to establish the boundaries of one’s legitimate moral space, and once that space has been defined, rights can be identified according to the limits of its boundaries. For example, if we include in the definition of coercion the act of speaking offensively to someone, we can then establish that speaking offensively to another person violates their moral space, and that they have a “right” against this kind of action on our part. In Nozick’s case, however, the rights he identifies must be justified with reference to some other concept. As we have seen, Nozick offers little justification for the rights he asserts other than the Kantian notion of treating individuals as ends as well as means. The lack of compelling justification Nozick offers for his rights therefore undermines the validity of his concept of coercion.

Even if we ignore the problem of establishing rights in the first place, Nozick’s definition of coercion has the potential to lead to absurd conclusions when applied to concrete situations. If person A is tried and convicted (under a fair and reliable procedure) for stealing person B’s money, and then is compelled by the threat of the violence of the State to pay B compensation, is it not accurate to say that A was “coerced” into paying B? Under Nozick’s theory, the agents of the State have acted within their rights, but it seems absurd to assert that A was acting voluntarily, i.e., *not* being coerced. Consider also an example involving private citizens. Person X has been (unsuccessfully) trying to convince person Y to enter into a business deal with him.

Furthermore, X has clearly expressed his disappointment at Y's non-agreement. Several days later, Y receives a horse's head in the mail, along with a note from X urging Y to reconsider his proposition. If Y signs a contract with X later that day, is it not arguable that Y has been coerced into doing so? While Nozick is not particularly clear on what precisely constitutes issuing a "threat" under the laws of his State, we can easily imagine the possibility that X has acted within his rights. It is not clear, after all, that X is implying that harm will come to Y if Y does not comply with X's wishes; perhaps X has lurid taste in gifts, and has sent the horse's head to Y as an innocent attempt—in lieu of, for example, a fruit basket—to gain Y's favor. In this case, it seems that X has acted within his rights, and that Y has been coerced.

Hayek on Coercion

Of those who advocate minimal government, Hayek presents one of the subtlest accounts of coercion. In *The Constitution for Liberty*, he addresses almost all major relevant questions necessary for a theory of coercion. Who may classify as a coercive agent? How do we differentiate between the natural forces that influence our actions, and the influences of other people's actions? Where does "coercion" fall on the spectrum between voluntary and nonvoluntary? Can there be degrees of coercion?

Hayek first addresses the importance of differentiating between the influences exerted by the natural world and the influences exerted by humans. He observes that if natural forces influence our actions, we say that that we have been "compelled by circumstances," whereas if a human agent is involved, we say that we have been "coerced."^{cxx} Therefore, as it is usually understood, coercion must involve a human agent; the "range of physical possibilities" a person is faced with has no "direct relevance" on the question of whether he acts freely or is coerced.^{cxxi} Why do we make this distinction? Hayek links the idea of liberty not with the "power to satisfy our wishes," but with the ability to make plans for achieving our goals using our knowledge of the world (that is, factors such as natural laws that others have no power over).^{cxxii} While Hayek does not assert that humans can attain certain knowledge of the world, he, like Mises, incorporates into his theory the idea that the physical laws of the universe are,

for the most part, stable and discernable by reason. Mises explains this idea in *Epistemological Problems of Economics*:

We are able to act at all—that is to say, we have the power to order our conduct in such a way that the ends we desire can be attained—only because the phenomena of the world are governed not by arbitrariness, but by laws that we have the capacity to know something about. If it were otherwise, we should be completely at the mercy of the forces that we should be unable to understand.^{cxxiii}

Unlike the circumstances and knowledge shaped directly by human whims, according to Hayek, nature operates according to laws; once we discover these laws, we can shape our behavior accordingly. By contrast, in an environment directed by human whim, an unavoidable element of uncertainty enters the picture, since we cannot predict human behavior. Hayek therefore believes that freedom “presupposes that the individual has some assured private sphere, that there is some set of circumstances in his environment with which others cannot interfere.”^{cxxiv} The crucial difference Hayek highlights is that while natural circumstances “will often be unpredictable, they will not maliciously frustrate our aims.”^{cxxv} It is from this foundation that Hayek defines the concept of “coercion”:

By ‘coercion’ we mean such control of the environment or circumstances of a person by another that, in order to avoid greater evil, he is forced to act not according to a coherent plan of his own but to serve the ends of another. Except in the sense of choosing the lesser evil in a situation forced on him by another, he is unable either to use his own intelligence or knowledge or to follow his own aims and beliefs. Coercion is evil precisely because it thus eliminates an individual as a thinking and valuing person and makes him a bare tool in the achievement of the ends of another.^{cxxvi}

Unlike many other minarchists, Hayek does not avoid the central dilemma in the concept of coercion. He notes: “It is not that that coerced does not choose at all; if that were the case, we should not speak of his ‘acting.’”^{cxxxvii} Hayek therefore asserts that while the coerced individual is not deprived of all of his “capacities,” he is “deprived of the possibility of using his knowledge for his own aims.”^{cxxxviii} Hayek does not offer a simple black-and-white formula. He states that while coercion necessarily implies “the threat of inflicting harm,”—with the intention to compel a certain action or set of actions on the coerced individual^{cxxxix}—the threat of physical violence is neither necessary nor sufficient to establish coercion.^{cxxx} Hayek illustrates this point by describing a hypothetical case in which a severe shortage of employment exists, and in order to survive an individual is forced to work for the only employer available. If this employer enforces “unreasonable” working standards, the individual in question, Hayek argues, can be said to be “coerced.” On the other hand, if the job market is plentiful, a single employer refusing to hire this person or enforcing unreasonable terms of employment would not “coerce” the individual.^{cxxxxi}

Hayek appears to boil the concept of coercion down to the intent of the coercer. Taking the same hypothetical set of circumstances as above, Hayek argues that the individual in question cannot be considered “coerced” if the one and only employer—whose wages mean the difference between life and starvation—does not intentionally use the individual’s dire circumstances to compel certain behavior on the individual’s part. Hayek states: “So long as the act that has placed me here in my predicament is not aimed at making me do or not do specific things, so long as the intent of the act that harms me is not to make me serve another person’s ends, its effect on my freedom is not different from any natural calamity...”^{cxxxii}

There are also cases, Hayek argues, that involve the threat of physical force but which do not imply “true” coercion. This is seen in his defense of the State as a coercive organ. In order to minimize the total amount of coercion in society, Hayek argues, a monopoly on coercion must be given to the State, which exercises such coercion in an “innocuous” fashion, as compared to coercion on the part of private individuals.^{cxxxiii} Unlike private individual coercion, State coercion is “made impersonal and dependent upon general, abstract rules,” and is thereby “deprived of its most harmful effects...”^{cxxxiv}

The laws enforced by the coercive power of the State thus become akin to “natural obstacles” that must be taken into account when formulating plans of action.^{cxixv} Why is such coercion necessary? Hayek maintains that governmental coercion protects “known private spheres”^{cxixvi} of action for private individuals, that is, it guarantees the individual a delimited environment in which certain facts are stable and not at the mercy of others’ whims.^{cxixvii} Hayek defines “freedom” as an environment in which men’s actions are “restricted only to general [i.e., non-arbitrary, not subject to human whim] rules,”^{cxixviii} and therefore, he concludes that freedom is “not a state of nature but an artifact of civilization.”^{cxixix}

Hayek does not simply proscribe coercion, but rather advocates a society in which the more severe forms of coercion are prevented, and the “lesser forms” are allowed.^{cxli} He delimits the notion of “unacceptable coercion” to situations in which the individual is unable to avoid the coercion. If, on the other hand, the coercion in question involves “known circumstances which can be avoided by the potential object of coercion,” then it is acceptable.^{cxlii}

A More Stringent Definition of Coercion?

In addition to certain theoretical difficulties that we will explore in a moment, Hayek’s theory suffers somewhat in practice. In particular, his characterization of the government as an “innocuous” source of coercion is suspect. While it seems reasonable that abstract, general laws directed at no particular individuals would not be particularly intrusive, we must also take into account the fact that no abstract entity known as the government enforces the law. Rather, government agents—composed of concrete individuals with biases and preferences—must interpret, apply, and enforce the laws. Hayek’s argument that coercion would imply the intent to “maliciously frustrate” our aims could therefore be fulfilled by those with the power to execute the laws of the State. We must also realize that Hayek’s inclusion of “malicious frustration” of a person’s aims under the rubric of coercion is apt to be problematic in application. It is possible to thwart a person’s aims with malicious intent and to do so through perfectly legal avenues (ones that Hayek, for Utilitarian purposes, would almost certainly keep legal), such as

organizing a boycott against that person's business. Conversely, there are also instances in which one acts coercively (and illegally), but with no malicious intent directed at the victim; a case such as this might arise if a homicidal maniac were to go on an indiscriminate killing rampage.

In *The Ethics of Liberty*, Murray Rothbard criticizes Hayek's theory of coercion, arguing that it is both too broad and too narrow to ensure individual freedom and security. In response to Hayek's contention that an employer can act as a coercive agent if the economy is desperate enough, Rothbard argues that freedom to make an exchange must necessarily include the idea of freedom to refrain from making an exchange.^{cxlii} Hayek's classification of a refusal to make an exchange as "coercive"—in the same way that compulsory exchanges are coercive—leads to the establishment of "rights" such as the right to continued employment, or the right to the necessities of life, Rothbard argues.^{cxliii} Rothbard also takes issue with Hayek's allowance that a "morose husband" or "nagging wife" could come under the blanket of "coercion," and his argument that outlawing these forms would be absurd since it would involve "even greater coercion."^{cxliv} The idea that there can be degrees of coercion, Rothbard argues, is a faulty one, since coercion "is not really an additive quality; how can we qualitatively compare different 'degrees' of coercion, especially when they involve comparisons among different people?"^{cxlv} Rothbard objects with equal vehemence to Hayek's characterization of State coercion as "innocuous," and especially his argument that such coercion is lessened by the fact that individuals know in advance the general rules and can prepare themselves for such environmental conditions accordingly. He cites Hayek's comment about the effect of individual foreknowledge and preparation: "Provided that I know before hand that if I place myself in a particular position, I shall be coerced and provided that I can avoid putting myself in such a position, I need never be coerced."^{cxlvi} In response to this, Rothbard quotes Professor Ronald Hamowy, from his article "Freedom and the Rule of Law," in *Il Politico*:

It follows that if Mr. X warns me that he is going to kill me if I
buy anything from Mr. Y, and if the products available from Mr.

Y are also available elsewhere (probably from Mr. X), such action on the part of Mr. X is noncoercive!^{cxlvii}

Thus, Rothbard maintains that Hayek's definition of coercion as a thing which can be measured by degrees and levels of severity both weakens the concept (in areas such as violent coercion) and overly broadens it (in areas such as economic coercion.)^{cxlviii}

The alternative he offers—one that is closely in line with theorists such as Mack, Rand, Hospers, and Boaz—is a strictly delimited definition of coercion. Rothbard defines coercion as “the invasive use of physical violence or the threat thereof against someone else’s person or (just) property...”^{cxlix} Non-violent acts, such as using one’s economic power (or the other person’s lack thereof) do not come under the rubric of coercion; conversely, acts by entities such as the State, which, though publicly-known and consistently enforced, employ the threat of violence, do count as coercion. On its surface, Rothbard’s definition seems unproblematic and far easier to apply to society than Hayek’s (or, for that matter, Nozick’s): if person A points a gun at person B and demands his money, it is a coercive act, whereas if person A refuses to give person B a job he desperately needs, or agrees to hire him, but only on absurdly stringent conditions, it is not a coercive act. However, when we apply Rothbard’s formulation to cases which fall somewhere in the middle of the spectrum, we begin to encounter problems.

The main dilemma becomes obvious once we realize that, in cases of coercion, there is only the *threat* of a violent act; if the victim complies with the aggressor’s demands, then the threat is not carried through and no violence has actually taken place. When we abandon the role of the omniscient observer of hypothetical scenario, and inhabit the world of limited knowledge and uncertainty, this fact becomes particularly relevant. What we must determine in all cases is this: Did person A *really* intend to carry out the violent act that person B thought he would unless certain demands were met? Certain cases strikes us as obvious. If A points a gun at B and says, “give me your money, or I’ll kill you,” it seems quite apparent that A intends to shoot B unless B gives A the money. The two major considerations in this case would seem to be (a) A’s apparent capacity to carry out his threat (i.e., his possession of a gun), and (b) A’s clear

communication of intentions (i.e., the speech he employs). Would the situation be judged differently if A had pointed his finger at B and said, “give me the money, or I’ll kill you”? Or, what if A, holding a real gun, had issued his threat in another language (one unknown to B), or in A’s own made-up language? What if he had pointed the gun in silence? What if A had simply issued his threat without a gun and without any threatening gestures? What if A—whose physical presence seemed threatening to B—had simply uttered the phrase as a joke; or, perhaps, as a newcomer to the English language, had uttered it innocently, with the purpose of practicing his English? The purpose of these questions is not to arrive at a definitive answer, but rather to underscore the problematic nature of attempting to draw a stark line between “coercion” and “noncoercion.” Rothbard seems to assume that Hayek’s theory of coercion has simply fallen prey to confused reasoning, or perhaps an unwillingness to introduce a definition of coercion that negates the legitimacy of the State. On closer examination, though, Hayek seems to be far more aware of the subtle difficulties plaguing the idea of coercion than Rothbard. For example, Hayek points out that gestures which seem innocuous and innocent to the “average” person can be construed by an anxiety-ridden person as coercive threats. However, he maintains that the law must be structured to fit the psychological state of the majority:

[W]hile we may pity the weak, or the very sensitive person whom a mere frown may ‘compel’ to do what he would not do otherwise, we are concerned with coercion that is likely to affect the normal, average person.^{ci}

While Hayek’s example of a “mere frown” might seem absurd, it is not so far removed from circumstances that Rothbard might have to seriously consider allowing under the rubric of coercion. What if person A, a physically-imposing man, looks at B (who is more diminutive in stature) with a threatening glare and demands that B do something (for example, lend him \$100)? What if we return to the example of sending someone a horse’s head—or something with equally unpleasant connotations—but making no overt threats along the lines of, “Do X, or I’ll do Y to you”? Keeping in mind

criteria such as the capacity to carry out the threat and the clear communication of the aggressor's intentions, it becomes difficult to draw the line between coercion and noncoercion. Assuming, for the moment, that we allow that an imposing physical presence is "coercive" when combined with the communication of certain demands, we must also consider the variable of the would-be victim's subjective perceptions. If person B has an irrational fear of redheads (perhaps he imagines that they have extraordinary strength, or supernatural powers), and A, a redhead, makes a demand of B, can we say that B has been coerced if he agrees solely because of his fear of A? In B's perception, A is a very real threat; but can A be held responsible for how B perceives him? To take a more realistic example, imagine that A is rumored to own several handguns and have an excessively bad temper. If he asks his neighbor, B (who is aware of these rumors), to mow his lawn—and does so in a bad-tempered voice—can we say that A is coercing B? Does it make a difference if the rumors about A are true or false?

This is not to say that Hayek's theory is significantly less problematic than Rothbard's, but rather only that Hayek addresses the difficulties of defining coercion, whereas Rothbard does not venture beyond simply defining it.

ⁱ need to cite Rawls from Th. of J here.

ⁱⁱ Rawls, John, *A Theory of Justice*. Cambridge: The Belknap Press of Harvard University Press (1971), pp. 18.

ⁱⁱⁱ Rawls, pp. 13.

^{iv} Rawls, pp. 12.

^v Rawls, pp. 12.

^{vi} Rawls, pp. 137.

^{vii} Ibid.

^{viii} Rawls, pp. 176.

^{ix} Rawls, Th. Of J, not sure what page—probably to be found in notes.

^x Rawls, "Justice as Fairness," (1957), pp. 337.

^{xi} Ibid.

^{xii} Rawls, "Justice as Fairness," pp. 337.

^{xiii} Kant, "Fundamental Principles of the Metaphysics of Morals," (1785), Section II. Available At: server.org/philosophy/kant/metaphys-of-morals.txt.

^{xiv} Ibid.

^{xv} Ibid.

^{xvi} Kant, section 1.

^{xvii} Rawls, "Justice as Fairness," pp. 337.

^{xviii} Kant, Sect. 1.

^{xix} Kant, Sect. 2.

^{xx} Rawls, *A Theory of Justice*, pp. 18.

^{xxi} Ibid.

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- xxii Kant, Sect. 2.
- xxiii Rawls, pp. 20
- xxiv Ibid.
- xxv Singer, Marcus G, "Justice, Theory, and a Theory of Justice." *Philosophy of Science*, Vol. 44, No. 4 (Dec., 1977), pp. 595.
- xxvi Rawls, pp. 131.
- xxvii Rawls, pp. 132.
- xxviii Rawls, pp. 133.
- xxix Rawls, pp. 133-4.
- xxx Rawls, pp. 135.
- xxxi Rawls, pp. 136.
- xxxii Rawls, pp. 136.
- xxxiii Rawls, pp. 136.
- xxxiv Choptiany, Leonard, "A Critique of John Rawls's Principles of Justice." *Ethics*, Vol. 83, No. 2 (Jan. 1973), pp. 149.
- xxxv Choptiany, pp. 149.
- xxxvi Choptiany, pp. 150.
- xxxvii Rawls, pp. 15.
- xxxviii De Jasay, pp. 19, footnote.
- xxxix Rawls, pp. 136.
- xl De Jasay, pp. 19 footnote.
- xli Rawls, pp. 20.
- xlii Ibid.
- xliii Rawls, pp. 47.
- xliv Rawls, "Justice as Fairness," pp. 332.
- xlvi Kant, Sect. 2.
- xlvi Nozick, pp. 32.
- xlvi Nozick, pp. 50.
- xlvi Nozick, pp. 50.
- xlvi Nozick, pp. 26.
- xlvi Nozick, pp. 33.
- i Ibid.
- li ibid.
- lii Davidson, pp. 345.
- liii Davidson, pp. 344. Need to get actual ASU reference out of this article (in JLS).
- liv Davidson, pp. 345.
- lv Nozick, pp. 34.
- lvi Nozick, pp. 48.
- lvii Nozick, pp. 48.
- lviii Nozick, pp. 45.
- lix Nozick, pp. 31.
- lx Ibid.
- lxi Nozick, pp. 32.
- lxii Kant, Sect. 1.
- lxiii Nozick, pp. 99.
- lxiv Nozick, pp. 27-8. Murray Rothbard's individualist-anarchist Ethics of Liberty puts it thusly: "the State, by its very nature, must violate the generally accepted moral laws to which most people adhere. Most people are agreed on the injustice and criminality of murder and theft. ...The State, then, is always in a vulnerable position, despite its seeming age-old might." (Ethics of Liberty, pp. 170). Citing Randy Barnett, he concludes: "the State by its very nature cannot obey its own legal rules. But if the State cannot obey its own legal rules, then it is necessarily deficient and self-contradictory as a maker of law." (*The Ethics of Liberty*, pp. 179.)
- lxv Rothbard, *The Ethics of Liberty*, pp. 252.
- lxvi Moore G.E., *Principia Ethica*. Cambridge: Cambridge University Press (1903), pp. 38.
- lxvii Rothbard, *The Ethics of Liberty*, pp. 9.
- lxviii Rothbard, *The Ethics of Liberty*, pp. 11.

- lxxix Rothbard, *The Ethics of Liberty*, pp. 30.
lxx Rothbard, *The Ethics of Liberty*, pp. 30.
lxxxi Rothbard, *The Ethics of Liberty*, pp. 40.
lxxxii Machan, pp. 15-16.
lxxxiii Rasmussen, Douglas, "A Groundwork for Rights: Man's Natural End." *Journal of Libertarian Studies*, Vol. IV, No. 1 (Winter 1980), pp. 73-74.
lxxxiv Tannehills, Linda and Morris, pp. 8.
lxxxv Hume, pp. 475.
lxxxvi Ibid.
lxxxvii Ibid.
lxxxviii Ibid.
lxxxix Rasmussen, pp. 73.
lxxx Rasmussen, pp. 74.
lxxxxi Tannehill, Morris and Linda, pp. 118.
lxxxii Rasmussen, pp. 73.
lxxxiii Rothbard, *The Ethics of Liberty*, pp. 29.
lxxxiv Ibid.
lxxxv Rothbard, *The Ethics of Liberty*, pp. 30-31.
lxxxvi Mack, Eric, "Individualism, Rights, and the Open Society," from *The Libertarian Alternative*, Machan, Tibor, Ed. Chicago: Nelson-Hall Co. (1974), pp. 27.
lxxxvii Mack, pp. 30.
lxxxviii Rothbard, *The Ethics of Liberty*, pp. 149.
lxxxix Ibid.
xc Machan, pp. 28.
xci Rothbard, *The Ethics of Liberty*, pp. 42.
xcii Rothbard, *The Ethics of Liberty*, pp. 152.
xciii Machan, pp. 27.
xciv Ibid.
xcv Rothbard, *The Ethics of Liberty*, pp. 12.
xcvi Rothbard, *The Ethics of Liberty*, pp. 11.
xcvii Machan, pp. 17.
xcviii O'Neil, Patrick M., "Ayn Rand and the Is-Ought Problem." *Journal of Libertarian Studies*, Vol. VII, No. 1 (Spring 1983), pp. 91.
xcix O'Neil, pp. 92-3.
c Rasmussen, pp. 74.
ci Friedman, David, *Hidden Order: The Economics of Everyday Life*. New York: HarperBusiness (1996), pp. 16.
cii Friedman, pp. 14-15.
ciii Friedman, pp. 15.
civ O'Neil, pp. 96.
cv Rothbard, *The Ethics of Liberty*, pp. 32.
cvi Rothbard, *The Ethics of Liberty*, pp. 33.
cvii Osterfeld, David, "The Natural Rights Debate: A Comment on a Reply." *Journal of Libertarian Studies*, Vol. VII, No. 1 (Spring 1983), pp. 106.
cviii Osterfeld "The Natural Rights Debate," pp. 107.
cix Osterfeld, pp. 107.
cx Rothbard, Murray, *Man, Economy, and State: A Treatise on Economic Principles*. Princeton: Van Nostrand Co. (1962), pp. 18.
cx1 Rothbard, *Power and Market*, pp. 3.
cxii O'Neil, pp. 94.
cxiii Mises, *Human Action*, pp. 105.
cxiv Hayek, F.A., *The Constitution of Liberty*. Chicago: The University of Chicago Press (1960), pp. 133.
cxv Nozick, pp. 262.
cxvi Nozick, pp. 263.
cxvii Nozick, pp. 238.

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- cxviii Ibid.
- cxix Hospers, pp. 18-19.
- cxx Hayek, pp. 133.
- cxxi Hayek, pp. 12.
- cxii Hayek, pp. 16.
- cxiii Mises, Ludwig von, *Epistemological Problems of Economics*. Princeton: Van Nostrand Co. (1960), pp. 198.
- cxxiv Hayek, pp. 13.
- cxv Hayek, pp. 134.
- cxvi Hayek, pp. 21.
- cxvii Hayek, pp. 133.
- cxviii Hayek, pp. 134.
- cxix Hayek, pp. 134.
- cxx Hayek, pp. 135.
- cxxi Hayek, pp. 136.
- cxii Hayek, pp. 137.
- cxiii Hayek, pp. 21.
- cxxiv Ibid.
- cxv Hayek, pp. 142.
- cxvi Hayek, pp. 21.
- cxvii Hayek, pp. 139.
- cxviii Hayek, pp. 155.
- cxix Hayek, pp. 54.
- cxl Hayek, pp. 138-9.
- cxli Hayek, pp. 142.
- cxlii Rothbard, *The Ethics of Liberty*, pp. 220.
- cxliii Ibid.
- cxliv Rothbard, *The Ethics of Liberty*, pp. 219.
- cxlv Ibid.
- cxlvi Rothbard, pp. 227, citing Hayek (*The Constitution of Liberty*) pp. 142.
- cxlvii Rothbard, pp. 227.
- cxlviii Ibid.
- cxlix Rothbard, *The Ethics of Liberty*, pp. 219.
- cl Hayek, pp. 138.

IV. Value and Possession

Property Theory

A significant portion of Nozick's property theory is driven by the need to respond to the ideas of distributive justice advanced by John Rawls in *A Theory of Justice*. In particular, he criticizes Rawls's "difference principle," which holds that "social and economic inequalities...are just only if they result in compensating benefits for everyone; and in particular for the least advantaged members of society."ⁱ Nozick criticizes this principle for two reasons: first, he argues that the original position parties would not be likely to choose the difference principle in their construction of a theory of justice; and second, he argues that such a theory would not be compatible with individual liberties. In offering an alternative to Rawls' theory of distributive justice, Nozick not only presents a theory of just acquisition and transfer of property, but explores the practical implications of implementing various theories of "just" distribution.

Many of the criticisms leveled at Nozick's property theory focus on the fact that he combines consequentialist and principle-based lines of reasoning. Karen Johnson's article, "Government by Insurance Company: The Antipolitical Philosophy of Robert Nozick," argues that Nozick's incorporation of the Lockean Proviso (which holds that original acquisition of property is only just if it makes no one worse off than before) undermines his process-based historical entitlement theory.ⁱⁱ John Stick, in a similar article, observes that Nozick's use of the Proviso seems incongruous, given Nozick's rejection of end-state (rather than historical) entitlement theories.ⁱⁱⁱ

It is worth examining not only whether the charges of inconsistency brought against Nozick's property theory are valid, but also whether a consistent theory of property (one which would be practicable in a free market context) can indeed be constructed. In this section, I will argue that while Nozick's property theory is neither logically consistent nor completely practicable in reality, attempts (such as Murray Rothbard's) to present a coherent, consistent theory of property based on Lockean principles (minus the Proviso, of course) cannot be reconciled with a subjective value theory.

Nozick on Just Original Acquisition

In advancing a theory of property, he both re-affirms the traditional Lockean theory of ownership and points out the irresolvable conflicts that make it impracticable in its pure form. Thus, although Nozick ultimately adopts Locke's theory of just property acquisition as a framework for developing a workable scheme, he does not hesitate to point out its many difficulties.

John Locke's *Second Treatise of Government* begins with the premise that man has ownership of himself, and therefore, by extension, his actions, i.e., his labor. Thus, when he "mixes" his labor with some unowned natural resource, it (the combination of his labor and the natural materials) becomes an extension of his "self"; it is his property as much as his own body is.^{iv} Locke argues that while the establishment of a claim on property requires no one else's consent (since all are equal in the State of Nature), in order for the individual's acquisition to be legitimate, there must be "enough, and as good left in common for others."^v This last caveat Nozick refers to as the Lockean proviso. Nozick clarifies its meaning thusly: "The crucial point is whether appropriation of an unowned object worsens the situation of others."^{vi}

Ignoring the Proviso for the moment, it is useful to examine some of the critiques Nozick offers Locke's "labor-mixing" theory of property acquisition. His first point regards the precision with which the theory can be applied. When an individual "mixes" his labor into an object, Nozick asks, how much of that object may be claimed as his property? Nozick offers the example of an astronaut landing on Mars (through private means, of course) and rendering a plot of land inhabitable for himself there. Does the astronaut thereby acquire property rights to the entire planet? If not, then how much of the planet becomes his?^{vii} The obvious response to Nozick's challenge would appear to be, the astronaut can lay claim to the plot of land he has cleared, nothing more. Unfortunately, this response, although temptingly straightforward, runs into problems when a literal approach is taken to delimiting where he "labored" and where he didn't. Let us assume that in order to make his piece of Mars real estate habitable, the astronaut's primary task is to remove the large, jagged rocks that cover 60% of the designated square

of land he wishes to claim. Once this task has been completed, where, precisely, can we say the astronaut has labored? Assuming that these rocks are scattered throughout the plot of land (that is, they do not comprise a single, unified block of rock covering the entire ground), is it accurate to say that the astronaut has labored on the *entire* plot of land he has selected for his property? Would it not be more accurate to designate the land he has “labored” on as *only* that land which fell directly beneath the various rocks he removed? If we include all the land falling *in between* the rock-covered portions of ground, can we truly say that this land, too, has been “labored” on? The astronaut has done nothing to alter the form of the non-rock-covered-portions; is his property therefore more properly defined as the noncontiguous patches of land where he removed the rocks? It is difficult to apprehend the logical implications of our decision in this example, so let us imagine that an explorer has discovered an uninhabited island, and that he fences in an area of land as his property. Laboring alone, he has added to the fenced-in property a house, a garden, and several walking paths. Obviously, the specific patches of land he has labored on do not take up the *entire* region he has enclosed; there are stretches of untouched grass and trees interspersed among his creations. How much of his fenced-in property does he justly own, and how much of it has been unjustly appropriated? At this point, it would be tempting to claim that one need not be quite so literal in applying Locke’s “labor-mixing” theory; if someone has claimed a plot of land for himself, and labored on part of it, then he may rightly claim the entire area as his. Unfortunately, this answer paves the way for abuses of the rule by more acquisitive individuals. If another explorer stumbles across an isolated land mass the size of New Zealand and constructs several houses (with interconnecting pathways) for himself at random points along the island’s shore, if he claims the entire island as his property, how can we maintain that his acquisition is unjust? It is true that there are large expanses of untouched land in between his various creations, but why deny him these, when we would allow an individual with a more modest claim on land to keep the regions he did not technically labor on?

Another major problem that Nozick raises has to do with the idea that “labor-mixing” automatically confers ownership. His question is a simple one: Why does mixing one’s labor into an object translate to *gaining* that object, rather than simply

losing one's labor?^{viii} His example suggests the difficulty in upholding the "labor-mixing" standard for acquisition without any supplementary provisos or limitations:

If I own a can of tomato juice and spill it in the sea so that its molecules (made radioactive, so I can check this) mingle evenly throughout the sea, do I thereby come to own the sea, or have I foolishly dissipated my tomato juice?^{ix}

Similarly, Nozick asks why adding labor to an object confers one's ownership over the *entire* object, rather than simply the labor that one has added to it.^x Because there is no literal or observable "joining" between one's labor and the unowned materials, why not simply maintain that one continues to own one's labor no matter where one "puts" it, but that the surrounding materials remain untouched and unowned? Even if we were to hold that a person gains ownership of a natural resource because one adds value to it (through one's labor), then why not, asks Nozick, confine one's ownership to the added value alone?^{xi}

Nozick and the Lockean Proviso

After detailing the difficulties of employing a simplistic "labor-mixing" theory, Nozick emphasizes that an "adequate" property acquisition theory *could* be devised by incorporating the Lockean proviso.^{xii} Nozick points out that when an object is acquired by any individual, everyone else is affected by this acquisition.^{xiii} An individual's situation, Nozick explains, can be worsened by another's acquisition in one of two ways: (1) the person's situation is worsened because he has now lost the opportunity to acquire that object and thereby improve his own situation, or (2) the person's situation is worsened because he is no longer able to use the appropriated object freely (as he could in the state of nature.)^{xiv} From these definitions of what makes a person "worse off," Nozick arrives at two possible versions of Locke's proviso: the "stringent" version, and the "weak" version.^{xv} The stringent version of the Proviso would require that, by acquiring some object, no one else could be made worse off in either the first or second sense of the term. The weak version, on the other hand, would require only that no one

be made worse off in the second sense. That is, if anyone's situation were worsened because he no longer had *any* use of the object, then the acquisition in question could be considered unjust.^{xvi} Nozick maintains that the incorporation of a weak version of Locke's proviso would be best in attempting to employ any sort of labor-mixing entitlement theory.^{xvii}

Nozick admits that certain dilemmas of application would have to be ironed out before such a theory could be employed. He points out that the successful application of the Proviso would require a "baseline" standard of living conditions would have to be established, since this would be the only means of judging whether an individual was actually made "worse-off" by someone else's appropriation.^{xviii} He also observes that the Proviso would have to apply equally to the *transfer* of property, and not just to its original acquisition. To illustrate his point, Nozick provides the example of an individual appropriating all the drinkable water from the state of nature (such that everyone else was left at his mercy); would this, he asks, be any different than if an individual were to purchase all of the drinkable water (perhaps with each separate purchaser unaware of his deals with the other purchasers)?^{xix}

While it would seem that the application of the Lockean proviso would be complicated and unwieldy in the context of the modern economy, Nozick is confident that a free market "will not actually run afoul" of it.^{xx} Indeed, he speculates that if it were not for the effects of "illegitimate state action," the possibility of violating the Proviso would hardly be considered more relevant to discussion than "any other logical possibility."^{xxi}

Criticisms of Nozick's Property Theory

Those arguing against Nozick's property theory tend to come from either the free-market camp—in which case their criticisms focus on the modifications he makes to traditional labor-mixing property theory—or the welfare State camp—in which case, criticism is primarily directed at his justification for (and application of) a Lockean foundation.

In “Turning Rawls Into Nozick and Back Again,” John Stick argues that Nozick does not provide a satisfactory argument for why he should adopt Locke’s theory as his foundation. Stick observes that Nozick simply presents Locke’s theory and then depends on its “intuitive appeal” to win over the reader.^{xxii} With regard to Nozick’s use of the Proviso, Stick argues that Nozick does not fully address its implications, and ignores the issues on which the Proviso would seem to undermine his position. Stick finds particularly unconvincing Nozick’s attempt to address the problem of modern economic conditions (where almost all natural resources are owned, and each new appropriation therefore makes others worse off) with his stipulation that as long as there is a “common stock of property sufficient to provide for the general welfare,” property holdings are not invalid.^{xxiii} Since no “common” property actually exists, Stick argues, Nozick’s response is inadequate.^{xxiv} Turning to Nozick’s argument that compensation could be paid by those whose acquisition of new property makes others worse off, Stick points out that on this issue Nozick has not provided sufficient details. He notes that Nozick has not identified *who* will be able to claim this compensation, *when* they will be able to claim it, and *how* much compensation is owed.^{xxv} Nozick’s failure to identify and argue for the parameters he would establish leaves open the possibility—depending on where the “baseline” is set—of claiming that every new child born into our society is due compensation, since almost everything has already been appropriated.^{xxvi}

Karen Johnson observes that Nozick’s use of the Lockean proviso “seems to acknowledge some kind of *public* interest in who gets what,” thereby opening the door to broader reforms to his entitlement theory.^{xxvii} Johnson employs one of Nozick’s own examples to illustrate her point. In discussing the effect of redistribution (and any attempt to enforce an end-state vision of economic justice), Nozick offers the example of people paying “extra” money to see Wilt Chamberlain play basketball. Nozick uses this scenario to point out that, even in a redistributive economy, an individual with services that other people are willing to pay for can become rich. If, for example, in order to see Chamberlain play, everyone attending an otherwise low-priced basketball game donated an extra 25 cents to him, he could legitimately end up with \$250,000, purely through the force of individual choice.^{xxviii} Johnson’s response to this example is that those million individuals had no idea what the collective effect of their individual donations would be

on Chamberlain's fortune, and therefore this cannot be seen as simply an exercise of unhindered individual choice. Johnson maintains that "a sum of individual voluntary acts clearly does not have the same moral status as a single voluntary act, whether of an individual or a collective body."^{xxix} At first glance, this argument seems specious, since no voluntary individual act is performed in a vacuum and must be judged in the context of the sum of all other voluntary individual acts. Carrying Johnson's argument to its logical extreme, one would have to conclude that no individual act could have the "moral status" of a voluntary act (except, perhaps, an act of thought.) Despite this, using Nozick's interpretation of the Lockean proviso, Johnson is able to lend support to her claim. What would happen, Johnson asks, if, instead of donating an extra 25 cents to see Chamberlain play, every individual signed over all of his property to Chamberlain? Though each individual act would not be devastating to the general population, if the entire population were to do this, then through their collective action, Chamberlain would gain a monopoly on every bit of property in an area, and this certainly would indicate devastating consequences for all. Nozick, Johnson contends, would then have to allow redistribution of Chamberlain's property so as to uphold the Proviso.^{xxx} Though this situation strikes us as so implausible as to be useless, we must note its striking similarity to Nozick's example of every water supplier in the world selling their stock to a single water monopolist (who would then be forced to compensate the general population).

From the anarchistic perspective, Murray Rothbard criticizes Nozick for not incorporating enough of Locke's labor-mixing theory, and for adopting Locke's proviso (which Rothbard terms "unfortunate"). When taken in conjunction with the Proviso, Locke's theory of just acquisition is significantly weakened, argues Rothbard, and, indeed, could be used to ultimately outlaw *all* private ownership of land.^{xxxi} Rothbard identifies the main problem with the Proviso as the fact that there is no definitive, objective way of determining when a person is "worse off" than before. Even if we assume a "baseline" situation, the Proviso does not take into account the varied utility scales of different individuals and the effect that psychic (and not simply material) disutility can have on a person's well being.^{xxxii}

Nozick On Productive versus Unproductive Exchange

An interesting component of Nozick's property theory is his proposal to prohibit blackmail (and similar activities) as an "unproductive" exchange akin to protection rackets. Nozick defines "productive activities" as those in which the purchasers of the good or service are made better off than they would if the seller had nothing to do with them in the first place.^{xxxiii} In an unproductive activity, on the other hand, "I gain nothing from you that I wouldn't possess if you didn't exist at all or existed without having anything to do with me."^{xxxiv} To illustrate his point, Nozick offers the example of a neighbor who, knowing that you do not want anything unsightly built on his property, makes it known that it is his plan to do so. He then offers you "deal" whereby you pay him to not build the offending item. The crucial element of this plot is that the neighbor would have had no intention of building such a thing if he had not predicted your opposition to it and willingness to pay to *prevent* it from being built.^{xxxv} Nozick therefore concludes that unproductive exchanges may be banned, since, if they were either impossible or prohibited, one of the parties in the exchange would be no worse off than if such exchanges were legal.^{xxxvi}

Several objections can be raised against Nozick's position. From a practical perspective, it is virtually impossible to *know* whether Party X is acting in good faith by announcing his intention to do something (e.g., build a fence, or publish a news story), or whether he is fishing for a bribe. The only case in which this is made obvious is where X announces that his intention is blackmail, and except in the case of threatening to publically someone's secret information, admitting this to the other party defeats the entire endeavor. (If you know that your neighbor really has no desire to build something unsightly on his property, and that he is only trying to induce you to pay him not to, then his attempt at blackmail fails.) Thus, from the perspective of *enforcing* Nozick's ban on blackmail, it seems nearly impossible to differentiate between actual blackmailers and those with a desire to do something, but who are willing to be paid off not to carry out their plans.

What *would* be the effect of enforcing a prohibition such as Nozick is proposing? Let us assume that the State enforces this prohibition by making transactions in which

one party pays the other *not* to do something illegal. Consider this case: Smith has information about Jones that Jones does not desire to be made public. Under Nozick's prohibitive law, how would the interests of Smith and Jones be affected? Several possible scenarios might emerge from this case. The first would be one in which Smith, learning Jones' secret, has a genuine desire to tell everybody he knows about it; however, if Jones were to approach him and offer to pay for his silence, Smith would accept it. Because of Nozick's "unproductive exchange" law, however, neither Smith nor Jones—both being law-abiding citizens who fear the consequences of breaking the law—will make the exchange, and Smith will spread Jones' secret, as was his initial desire. A second scenario would run along the same lines as the first, but in this case, Smith and Jones are both willing to break Nozick's prohibition against unproductive exchanges. They draw up a "contract" in secret and both are pleased with the outcome of the circumstances. The illegality of their act is probably some cause for discomfort to both of them, in that they know what they are doing could have legal repercussions. In the third scenario, Smith purposely goes looking for and uncovers Jones' secret for the sole purpose of blackmailing him. Aware of the laws against blackmail, however, Smith merely makes it known to Jones that he knows of his secret, and that he intends to tell others about it; he does not explicitly prompt Jones with a demand for money in exchange for his silence. Because Jones is law-abiding to the degree that he would rather have his secret made known than risk criminal charges, he is forced to accept this option, now that the alternative of offering Smith money for his silence has been made highly unattractive. It should be noted that regardless of whether Smith chooses to actually divulge Jones' secret, Jones will probably experience added anxiety regarding the possibility that Smith will do so. It is also possible that Smith, knowing Jones' desire to keep the information secret, takes advantage of Jones' position and presses him for non-monetary favors, which Jones would likely grant him, in hopes of gaining his favor and therefore his silence.¹ In the fourth scenario, Jones would rather risk criminal charges than allow his secret to be known, and he offers Smith a bribe, which Smith accepts. The concrete outcome of the fourth scenario differs from the likely outcome of such a

¹ Indeed, this might point to a failure on Nozick's part to take into consideration that "exchanges" need not necessarily always be monetary, or even material.

scenario *without* the prohibition on blackmail in a small but significant way. Under non-prohibition, the exchange would take place in the manner described above, although Jones' evaluation of his options might differ. Under prohibition, the exchange would take place and if Smith were to renege on his "contract," Jones would have no avenue of legal recourse, since bringing the blackmail/bribery scenario to the attention of the officials would bring criminal charges down on both Smith and Jones. Jones would now be at the mercy of Smith's integrity.

How precisely have the circumstances changed under Nozick's prohibition of "unproductive" exchanges? Nozick contends that prohibiting such exchanges would make at least one party "no worse off."^{xxxvii} Let us examine the outcome of the scenarios. In scenario one, both Smith and Jones are made worse off, since Jones is denied the opportunity to buy Smith's silence, and Smith is denied the opportunity to gain money in exchange for his silence (which, given his willingness to make the exchange, he obviously prefers to spreading Jones' secret.) Under scenario two, both are made worse off due to the increased level of anxiety they experience, since they know they are running the risk of getting caught. In the third scenario, Jones is made worse off, since he will either have his secret revealed or be at the mercy of Smith's whims. In the fourth scenario, Jones is made worse off, since, under prohibition, he has no chance for legal recourse if Smith should decide to renege on their deal. Thus, Nozick's claim that banning "unproductive exchanges" would be to the benefit of at least one party loses its persuasiveness when applied to a situation that might actually arise.

It should also be noted that the scope of Nozick's definition of "unproductive" exchanges is far too broad for a Libertarian context. Many circumstances arise on the free market in which one party would be better off if the other did not exist at all, or did not have anything to do with the first party. How is party A's intention to establish a competing business in the same area as party B's similar business any different than A's intention to build a fence on his property that he knows B will dislike? If B offers A a sum of money to not establish a competing business and A accepts the money, has an "unproductive" exchange taken place? The situation certainly seems to fit Nozick's description: B would certainly be better off if A did not exist at all, and he would also be better off if A had nothing to do with B (i.e., if their lives did not coincide.)

Rothbard offers a similar commentary on Nozick's idea of "unproductive" exchanges. In the case of a blackmail situation between Smith and Jones, Rothbard observes:

Jones is paying not for Smith's making him better off, but for not making him worse off. But surely the latter is also a productive contract, because Jones is still better off making the exchange than he would have been if the exchange were not made?^{xxviii}

Rothbard also points out that Nozick's criterion of one party being better off than if the other did not exist at all or had nothing to do with him could apply equally to the participants in an auction. Rothbard concludes by pointing out that modern economic thought holds that all voluntary exchanges are labeled as "productive," since both parties obviously feel that they are better off making the exchange (or else they would not have engaged in it in the first place.)^{xxix}

The Difference Principle

Although Nozick lays the groundwork for his property theory, the bulk of his discussion of property rights addresses Rawls' contention that the "difference principle" could be not only selected by the original position parties, but also employed successfully in society.

Rawls' endorsement of the "difference principle" as one of the two primary principles of justice is one of the most controversial arguments in *A Theory of Justice*. Rawls maintains is that those in the original position would establish a principle of justice stating that inequalities (in wealth or power) can only be justified if they result in benefits for the least well-off members of society.^{xi} Those in the original position, Rawls argues, would realize that everyone's well being depends on the "scheme of cooperation" in society; therefore, the willing cooperation of every member—whether advantaged or disadvantaged—must be secured. Rawls contends that the difference principle would allow the "better-situated" individuals to gain the cooperation of those "less well-

situated.”^{xli} These are the only “reasonable terms” able to secure social cooperation between the better-situated and worse-situated potential members of society. It is important to note that Rawls delimits the actual application of the difference principle so that it applies only to “the expectations of representative individuals” and not to the “distributions of particular goods to particular individuals.”^{xlii} Thus, in actual practice, the difference principle is relatively modest, ensuring only that “the social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate.”^{xliii}

Upon examining Rawls’ difference principle (and his assumption that it would be chosen in the original position), several problems—both theoretical and practical—immediately leap to mind. Terms such as “benefit,” “expectations,” and “representative” require a more concrete definition. For example, how would the “representative individual” from each group be drawn, and how many groups would be established? Simply drawing a line between the upper and lower halves of the economic spectrum and designating a “better off” and “worse off” group appears overly simplistic. On the other hand, we have to wonder how many different income brackets would have to be considered to truly “represent” all relevant interests, and whether “income” would be the sole consideration. (What about expenses such as raising children or higher regional costs of living?) Our definition of the “representative” man will also have a significant effect on how the term “benefit” is used. After all, it cannot be assumed that everyone of a similar economic position has the same set of interests. What if certain members of an economic group consider free, compulsory education to be a “benefit,” while others consider it a hindrance? Finally, given Rawls’ narrowing of the term “benefit” to mean a raise in “expectations” or “prospects,” it seems even less likely that drawing a “representative” individual based on each group would convey any useful information. Each individual’s expectations and evaluation of his circumstances will depend heavily on his opinion of his current situation and how he weights his future goals. It seems unlikely that we could ever arrive at any sort of coherent standard. Indeed, how could we actually establish that someone’s expectations had been raised? As an internal, emotional phenomenon, it is less than obvious.

Regarding the establishment of the difference principle, Nozick makes several points. His first observation addresses the issue of the actual adoption of this principle by those in the original position. Given Rawls' assertion that everyone gains by social cooperation (and that none could exist satisfactorily without it), why, asks Nozick, would the (potentially) worse-off members of society demand asymmetrical benefits? After all, everyone can "reasonably" be expected to participate in the "scheme of cooperation,"—without any additional benefits—since, according to Rawls, no one can have a satisfactory existence without it. Thus, the moment that "social cooperation" has been established, all have benefited—the potentially better-off as well as the potentially worse-off. There is simply no need for additional benefits to convince the worse-off group to participate.^{xliv} Nozick points out that the difference principle's provision of extra benefits to the worse-off members of society is as blatantly asymmetrical (i.e., "unjust") as a scheme whereby the better-off in society can only be convinced to "cooperate" with the worse-off if, in addition to the benefits they receive from social cooperation, they also receive an extra tribute from the worse-off.^{xlv}

Nozick also points to the flaw in the causal connection Rawls asserts between the wealth of the better-off and the poverty of the worst-off. He observes that if G is worse off than F, and under a different distributive scheme, G has slightly more and F slightly less, one cannot necessarily conclude "that G is badly off because F is well off" or that "G is badly off *in order that* F be well off" or even that "F's being well off makes G badly off..."^{xlvi} Nozick also challenges Rawls' automatic assumption (which he also attributes to the original position parties) that equality is the "ideal" state and that any deviation from it is arbitrary unless proven otherwise. Even if people do not "deserve" the talents or fortunes that make them wealthier than others (or, conversely, the lack of ability or luck that makes them less wealthy), why, Nozick asks, should people's wealth be equal?^{xlvii}

Because Rawls, too, rejects Utilitarianism on the basis of its disregard for individual autonomy, Nozick examines the way in which Rawls' theory of distributive justice treats individuals. Rawls' argument that factors such as natural ability are "arbitrary from a moral point of view," Nozick argues, fails to take into consideration the factor that individual choice plays in electing to develop and use natural abilities.^{xlviii}

Nozick argues that the direction Rawls is leaning—one in which no one is responsible for his actions since everything can be attributed to environmental factors—is a dangerous one, in that it downplays the importance of individual autonomy. It is, Nozick argues, “a risky line to take for a theory that otherwise wishes to buttress the dignity and self-respect of autonomous beings.”^{xlix}

Finally, Nozick is particularly critical of the fact that Rawls’ theory of distributive justice argues for the establishment of a particular “end-state” rather than taking a “historical” approach, whereby entitlements are determined by just processes. Nozick’s historical theory of entitlement bases property claims on *how* a particular possession was acquired: for the most part, if it was acquired justly through original appropriation or voluntary transfer, it is legitimate. The original position that Rawls begins with, argues Nozick, biases parties in the initial position toward establishing an end-state theory of property, whereby holdings are justified with regard to the overall distribution pattern in society.ⁱ From a practical standpoint, he argues, end-state theories are flawed, since they must assume either a centralized government organ capable of continuously redistributing holdings so that they agree with the “just” pattern, or individuals who spend money only on themselves.ⁱⁱ Nozick asks: If the holdings in a society are redistributed so that they conform to a desired pattern, and then, through voluntary individual transactions, shift so that they no longer conform to this pattern, is the second distribution of holdings not as just as the first one? An end-state theory of just holdings would have to say “no,” even though, Nozick observes, the second pattern came about through purely voluntary interactions.ⁱⁱⁱ From a theoretical standpoint, an end-state theory is equally unsatisfactory. Because of the necessarily redistributive element of an end-state theory of property, its implementation requires that the earnings of some individuals are appropriated and distributed to others.^{liii} Thus,

Whether it is done through taxation on wages or on wages over a certain amount, or through seizure of profits, or through there being a big *social pot*...patterned principles of distributive justice involve appropriating the actions of other persons. ...If people force you to do certain work, or unrewarded work, for a certain period of time, they decide what you are to do and what

purposes your work is to serve apart from your decisions. This process whereby they take this decision from you makes them a *part-owner* of you; it gives them a property right in you.^{liv}

Other Opinions on the Difference Principle

One of the major criticisms brought against Nozick's evaluation of the difference principle is that he over-simplifies Rawls' position. John Stick argues that, contrary to Nozick's description, the difference principle does not imply *ad hoc* redistribution by the government every time society deviates from the ideal pattern of holdings. Rather, the egalitarian "end-state" pattern envisioned in the original position would be the basis for the formation of property laws, which would operate in a historical, not end-state, manner.^{lv} Thus, although the property rules themselves will be designed in order to bring about the ideal economic pattern, they will be applied in the same way that Nozick's Lockean rules of just acquisition and transfer would be.^{lvi} According to Stick, "Rawls uses end-result considerations to determine what the rules should be, not to assign particular shares to particular individuals."^{lvii} Stick also argues that although Nozick may evaluate the rules of taxation as unjust, they cannot be critiqued from a historical perspective, since they would be known in advance by taxpayers and applied in a consistent manner; therefore, Nozick's rejection of taxation is "an ahistorical critique of historical rules."^{lviii}

John Exdell, in his article, "Distributive Justice: Nozick on Property Rights," argues that Nozick's theory of just holdings is not necessarily the only legitimate outcome of applying Kantian moral premises. With regard to Nozick's contention that taxing the wealthy to provide for the poor uses the former as means to the ends of the latter, Exdell argues that one cannot draw this conclusion unless it is first proven that "the existing distribution of wealth is just—that it was not itself brought about by violations of the imperative."^{lix} Exdell argues that a "rational alternative" exists to the Lockean theory of just acquisition: namely, that "land and natural resources are held inalienably by mankind or by society..."^{lx} Anticipating the criticism that such a theory would make it impossible for anyone to appropriate resources and employ them in a useful, productive

manner (since one would first have to gain everyone's consent before doing so), Exdell responds that the theory of "social ownership" need not be taken as a legal doctrine, but a moral one.^{lxi} This concept would simply require that those controlling resources or land would be partially beholden to the rest of the community to use them to society's benefit, and not "profit excessively at the public's expense."^{lxii} (Exdell's response, of course, seems to ignore the factor of human motivation: What entrepreneur would be willing to take on the responsibility of managing "public resources," knowing that the amount of profit he makes off the venture will be dependent on the public's evaluation of how much profit he "really" needs? This scheme seems to eliminate the entrepreneur's desire to more effectively service public wants (and thereby gain more profits), since his profit would always be tied to public opinion).

Is Lockean Property Theory Salvageable?

Many of criticisms aimed at Nozick's property theory focus on his failure to employ the Kantian principles and methods he adopts in a consistent manner. Rothbard claims to present a more coherent theory of property. He drops the Proviso altogether, and instead integrates an Austrian approach to acquisition and transfer of property. We will examine two major issues with regard to Rothbard's challenge to Nozick. First, is Rothbard able to overcome the problems in the "labor-mixing" theory of value that Nozick points out? Second, how do Rothbard's own Austrian premises affect his attempt to establish the validity of Locke's "labor-mixing" theory?

In *The Ethics of Liberty*, Rothbard not only explicitly rejects Locke's Proviso^{lxiii}, but also states his own adherence to Locke's "labor-mixing" theory of just original acquisition.^{lxiv} In an isolated situation, Rothbard explains, no problems arise as to what a man legitimately owns; whatever he "uses and transforms" becomes his.^{lxv} Once other men are introduced, ownership is similarly determined. Rothbard asserts that it is easy to distinguish what a man legitimately owns from what he merely "pretends" to own:

Suppose that Crusoe had landed not on a small island, but on a new and virgin continent, and that, standing on the shore, he had

claimed 'ownership' of the entire new continent by virtue of his prior discovery. This assertion would be sheer empty vainglory....For the *natural fact* is that his true property—his *actual control* over material goods—would extend only so far as his actual labor brought them into production. His true ownership could not extend beyond the power of his own reach.^{lxvi}

In *Man, Economy, and State*, Rothbard maintains that in a “free society,” land would become an individual’s property when it has been cultivated or altered “in some way.” One would not be allowed to simply claim in advance unowned land or resources and “reserve” them for later use.^{lxvii} However, once someone has altered and claimed the natural resources in question, they need not, argues Rothbard, continue to labor on the property in question; once the initial labor has been expended, it has become “irretrievably mixed” with the materials.^{lxviii} In justifying the idea that laboring upon something makes it one’s property, Rothbard quotes Wolowski and Levasseur, who argue that by adding his labor to some natural material, man alters its very composition: “Before him, there was scarcely anything but matter; since him, and by him, there is interchangeable wealth.”^{lxix}

Do such elaborations overcome the ambiguities that plague the “labor-mixing” theory of property acquisition? Rothbard leaves most of the dilemmas Nozick raises either untouched or unresolved. Rothbard’s only response to Nozick’s question of whether an astronaut landing on Mars could claim the entire planet as his property seems to be the example he gives of the man claiming an entire continent as his own. All this example offers, however, is the counsel that a man’s property can only legitimately extend over what he has the power to control. Rothbard’s meaning here is somewhat unclear. Does the individual in question have to actually exercise the “power of his reach” to claim something legitimately as his property, or is his potential ability enough to justify his claim? Rothbard’s comment in *Man, Economy, and State* regarding the illegitimacy of attempting to claim resources in advance seems to provide a negative answer to this. Such an answer, however, leads us to the problem discussed earlier concerning property acquisition, namely: What proportion of our “property” must we

directly labor on in order to claim something like a plot of land, or even a fruit-bearing tree? Even with a square of land we clear, or an apple tree we pick the fruit off of, there remain patches of “unaltered” material. For example, consider this case: Smith claims an unowned apple tree as his property because he regularly picks the apples off the bottom segment of branches, though not the upper branches, because he cannot reach them. Jones, upon encountering the tree with his ladder, notices the apples in the upper branches and decides to harvest them. Smith protests that the apple tree belongs to him, since he labored on it first. Jones responds by pointing out that Smith was only “laboring” on the bottom half of the tree, and that it was Jones who first expended his labor to “alter” the upper half. Whose claim is legitimate?

We must also address the problematic nature of the concept of “labor-mixing” itself. Rothbard does not address Nozick’s challenge to the assumption that mixing one’s labor into an object causes one to gain that object, rather than lose one’s labor. Nor does he fully unravel the meaning of “mixing one’s labor” into natural resources. Jeremy Waldron, in his article, “Two Worries About Mixing One’s Labour,” explores the complications that arise when one attempts to pin down the idea of “mixing” labor into a natural object. He first addresses the use of the word “mixing.” When we consider the idea of “mixing,” he argues, we generally maintain that “the only things that can be *mixed* with objects are other objects.”^{lxx} Labor is not an object, but an action; how, then, can an action be “mixed” with an object? In the act of mixing, he observes, “There is the mixer, the action of mixing, and the object into which something is being mixed; *but there is nothing which is being mixed in.*”^{lxxi} Anticipating the objection that “mixing one’s labor” is simply meant to translate to “laboring on an object,” Waldron points out that this contention would severely damage the justification for property rights.^{lxxii} In defining property rights, Locke’s formulation clearly depends on the idea of self-ownership, and, by extension, those things in which one has imbedded “oneself”; that is, one’s labor has come under the rubric of self-ownership. Thus, it is crucial that one’s “spirit” or “self”—via one’s labor—becomes literally “mixed” into an object, if one is to be able to claim it as property. If however, we decide to abandon Locke’s line of reasoning altogether, and attempt to simply show that an individual labors on an object, we run into the problem of justification. As Waldron points out, what is it about laboring

on an object that confers ownership on the laborer?^{lxxiii} In a vein similar to Nozick, Waldron notes that it could simply be the case that one owns the labor that has become embedded in the object, but not the entire object itself.^{lxxiv} Waldron also points to the absurdity of maintaining that the labor exists *after* it has been expended, since “once the mixing takes place, the labour is to all intents and purposes lost in the object,” that is, “the labour, *qua* labour, no longer exists.”^{lxxv} Finally, Waldron addresses the question of the rights of the laborer. While conceding that the laborer would certainly have rights over his labor in the sense that no one would be entitled to compel him to expend it, Waldron points out that once the laborer has freely expended his labor, it seems absurd to maintain that the laborer has ownership rights to his past actions. He concludes, “There is no intelligible question of my liberty *now* in respect of actions I performed freely *yesterday*.”^{lxxvi} Rothbard’s attempt to define with greater precision what is meant by “mixing one’s labor” does not significantly weaken these criticisms. He explains the “labor-mixing” concept by claiming that when a man alters natural materials, he is “stamping the imprint of his personality and his energy” on them, thereby converting them into his property.^{lxxvii} This formulation leaves much to be desired, since the “imprint” of a personality or energy cannot be objectively proven, or even clearly defined.

Despite the internal difficulties Locke’s labor-mixing theory of property present Rothbard, nothing is more damaging to his position than his own adherence to the Austrian theory of value. One of the primary tenets of the Austrian economic approach to property and value is that the value of a commodity (good or service) arises from and is expressed solely through the price actually paid in its exchange. One cannot determine a commodity’s value by attributing a certain amount of “usefulness” to it, or the number of labor-hours that went into it.^{lxxviii} In *Human Action*, Mises points out that when we speak of a “scale of value,” we do so in a purely hypothetical and abstract sense, since it “manifests itself only in real acting,” i.e., actual expressions of preferences in exchanges.^{lxxix} Rothbard echoes this sentiment in *Man, Economy, and State*, noting that “Value exists in the valuing minds of the individuals...”^{lxxx} Indeed, he goes on to point out that in any exchange, an inequality of (perceived) values is necessary for both buyer and seller to be willing participants to the exchange: “For each exchange there is a *double*

inequality of values, rather than an equality, and hence there are no ‘equal values’ to be ‘measured’ in any way.”^{lxxxii} William Smart observes in *Theory of Value* that value “in all its forms implies a relation.”^{lxxxiii} Smart stresses that the wants expressed in economic exchange are not necessarily “rational” or “healthy,” and that in modern economics, “The *desirable* is interpreted...by the *desired*.”^{lxxxiii}

While Rothbard rejects Mises’ subjectivism in the realm of moral values, he fully adheres to the subjective Austrian theory of economic value. This introduces a new problem into Rothbard’s use of Locke’s “labor-mixing” theory of property acquisition: If the value of a commodity exists only in the exchange made between two valuers (and only at that moment), then how are we to determine, in applying the labor-mixing theory of acquisition, what counts as “labor” worthy of conferring property rights? It would seem that Nozick’s example of pouring a can of tomato juice into the ocean would confer an equally legitimate property right as tilling the soil so that it can be farmed, or converting a pile of unused wood into furniture. In order to delimit the concept of “labor” from any conceivable action, Rothbard would be forced to attribute some sort of value-adding process to it. Indeed, he seems to lean toward this notion in his explanation of property rights in *The Ethics of Liberty*: “By finding land resources, by learning how to use them, and, in particular, by actually *transforming* them into a more useful shape, Crusoe has, in the memorable phrase of John Locke, ‘mixed his labor with the soil.’”^{lxxxiv} Rothbard’s use of the word “useful” betrays his implicit attribution of value to the labored-upon natural resource, for it is not possible to divorce the implication of value from the word “useful.” Just as the word “value” necessarily implies a valuer in economics, the word “useful” is meaningless until we determine the “use” in question. Therefore, unless some (non-Austrian) standard of value is imposed upon the different ways in which an individual can act upon an unowned portion of land or materials, then *any* action directed against unowned resources must be construed as “labor.” What if a man encounters a wild patch of apple trees and burns them, declaring his creation to be “art”? Obviously, the man has “labored” on them insofar as he has altered them, or “transformed” them in some fashion. If the man later sells his creation to another individual—who perceives it as art as well—then can it not be considered both valuable and useful? It is valuable, since an exchange obviously took place; and it certainly may

be considered “useful,” in that the individual who purchased the destroyed trees found a use for them as art. The Tannehills make a similar point in *The Market for Liberty*. They observe that it would be difficult to determine how much labor must be mixed with the resources in question, and what kind of labor it has to be. They also ask whether the changes to the natural materials would have to be permanent, and if so, “how permanent?” Would economic improvement to the land be necessary to establish a clear title to ownership?^{lxxxv} They assert:

Of course, making visible improvements to the land would certainly help to establish a man’s title more firmly by offering further proofs of ownership. ...But mixing one’s labor with the land is too ill-defined a concept and too arbitrary a requirement to serve as a *criterion* for ownership.^{lxxxvi}

In his article “Private Property and Collective Ownership,” James Sadowsky addresses the issue of owning “virgin,” i.e., *unaltered* or *untransformed* land. Those who argue that such land cannot be claimed because the would-be owner has done nothing to “improve” its value, he points out, run directly into the problem of value. He asserts that this idea “relies on a totally false supposition: that by transforming an object we can increase its value. There is no such thing as value *in* the object. Objects are valued by people: what is valued by people is the physical reality. People do not value values!”^{lxxxvii} Mises expresses a similar thought when he observes, “Strictly speaking, people do not long for tangible goods as such, but for the services these goods are fitted to render them.”^{lxxxviii}

ⁱ Rawls, pp. 15.

ⁱⁱ Johnson, Karen, “Government by Insurance Company: The Antipolitical Philosophy of Robert Nozick.” *The Western Political Quarterly*, Vol. 29, No. 2 (June 1976), pp. 184.

ⁱⁱⁱ Stick, John, “Turning Rawls Into Nozick and Back Again.” *Northwestern University Law Review* (Spring 1987), Pp. 11.

^{iv} Locke, John, *Second Treatise of Government*, pp. 128.

^v Locke, pp. 129.

^{vi} Nozick, pp. 175.

^{vii} Nozick, pp. 174.

^{viii} Nozick, pp. 174-5.

^{ix} Nozick, pp. 175.

^x Ibid.

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- ^{xi} Ibid.
 - ^{xii} Nozick, pp. 178.
 - ^{xiii} Nozick, pp. 175.
 - ^{xiv} Nozick, pp. 176.
 - ^{xv} Ibid.
 - ^{xvi} Ibid.
 - ^{xvii} Nozick, pp. 178.
 - ^{xviii} Nozick, pp. 177.
 - ^{xix} Nozick, pp. 180.
 - ^{xx} Nozick, pp. 182.
 - ^{xxi} Ibid.
 - ^{xxii} Stick, pp. 12.
 - ^{xxiii} Stick, pp. 16.
 - ^{xxiv} Ibid.
 - ^{xxv} Stick, pp. 17.
 - ^{xxvi} Stick, pp. 18.
 - ^{xxvii} Johnson, pp. 184.
 - ^{xxviii} Johnson, pp. 183-4.
 - ^{xxix} Johnson, pp. 184.
 - ^{xxx} Johnson, pp. 184.
 - ^{xxxi} Rothbard, *The Ethics of Liberty*, pp. 224.
 - ^{xxxii} footnote on psychics utility to either rothbard or mises.
 - ^{xxxiii} Nozick, pp. 84.
 - ^{xxxiv} Nozick, pp. 84.
 - ^{xxxv} Nozick, pp. 84-5.
 - ^{xxxvi} Nozick, pp. 85.
 - ^{xxxvii} Nozick, pp. 85.
 - ^{xxxviii} Rothbard, "Robert Nozick and the Immaculate Conception of the State," pp. 9.
 - ^{xxxix} Rothbard, pp. 9-10.
 - ^{xl} Rawls, *A Theory of Justice*, pp. 15.
 - ^{xli} Ibid.
 - ^{xlii} Rawls, pp. 64.
 - ^{xliiii} Rawls, pp. 75.
 - ^{xliv} Nozick, pp. 192-3.
 - ^{xlvi} Nozick, 193.
 - ^{xlvii} Nozick, pp. 191.
 - ^{xlviii} Nozick, pp. 223.
 - ^{xlix} Nozick, pp. 214.
 - ^l Ibid.
 - ^{li} Nozick, pp. 161 (need to check).
 - ^{lii} Nozick, pp. 167.
 - ^{liii} Nozick, pp. 161.
 - ^{liiv} Nozick, pp. 172.
 - ^{liv} Nozick, pp. 172.
 - ^{lv} Stick, pp. 10.
 - ^{lvi} Ibid.
 - ^{lvii} Ibid.
 - ^{lviii} Stick, pp. 11.
 - ^{lix} Exdell, John, "Distributive Justice: Nozick on Property Rights," *Ethics*, Vol. 87, No. 2 (Jan. 1977), pp. 143.
 - ^{lx} Exdell, pp. 149.
 - ^{lxi} Exdell, pp. 148.
 - ^{lxii} Exdell, pp. 148.
 - ^{lxiii} Rothbard, *The Ethics of Liberty*, pp. 244.
 - ^{lxiv} Rothbard, *The Ethics of Liberty*, pp. 34.

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- lxv Ibid.
- lxvi Ibid.
- lxvii Rothbard, *Man Economy, and State*, pp. 147.
- lxviii Rothbard, *Man, Economy, and State*, pp. 147-8.
- lix Rothbard, *Man, Economy, and State*, pp. 148.
- lxx Waldron, Jeremy, "Two Worries About Mixing One's Labour." *Philosophical Quarterly*, Vol. 33, No. 130 (Jan. 1983), pp. 40.
- lxxi Waldron, pp. 41.
- lxxii Ibid.
- lxxiii Ibid.
- lxxiv Waldron, pp. 42.
- lxxv Waldron, pp. 43.
- lxxvi Waldron, pp. 44.
- lxxvii Rothbard, *The Ethics of Liberty*, pp. 34.
- lxxviii Need to find Austrian (maybe Mises or Rothbard) quote for this.
- lxxix Mises, *Human Action*, pp. 102.
- lxxx Rothbard, *Man, Economy and State*, pp. 87.
- lxxxi Ibid.
- lxxxii Smart, William, *An Introduction to the Theory of Value*. London: MacMillan and Co. (1910), pp. 5.
- lxxxiii Smart, pp. 10.
- lxxxiv Rothbard, *The Ethics of Liberty*, pp. 34.
- lxxxv Tannehill, Morris and Linda, pp. 57.
- lxxxvi Tannehill, Morris and Linda, pp. 58.
- lxxxvii James Sadowsky, "Private Property and Collective Ownership," from *The Libertarian Alternative* pp. 123.
- lxxxviii Mises, *Human Action*, pp. 234.

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